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PREVENTIVE JUSTICE AND THE RULE OF LAW

In this article it is proposed to review the present state of the law relating to the power to bind over to keep the peace and to be of good behaviour, particularly in the light of the recent decision of the Court of Appeal in *Everett* v. *Ribbands*.[1]

It will be convenient to begin by setting out a passage from the judgment of Denning L.J. in this case. He said:

> "An order to find sureties . . . now bears many of the characteristics of a criminal proceeding. . . . The substance of the matter is, not only fear of what the accused man may do, but also a complaint of something he has already done—some words or conduct which give rise to apprehension of disorder or other breach of the law. An order can only be made against the man if two things exist: first, a threat by words or conduct to break the law of the land or to do something which is likely to result in a breach; secondly, a reasonable fear that this threat will be carried into effect. The order, once made, will result in imprisonment if the accused man has no friends to stand by him. This imprisonment must be founded on something actually done by him. It would be contrary to all principle for a man to be punished, not for what he has already done, but for what he may hereafter do. Hence there must be something actually done by him, such as threats of violence, interference with the course of justice, or other conduct which gives rise to the fear that there will be a breach of the law."

Admirable as this is as a statement of what the law ought to be, it does not, unhappily, altogether represent the past practice of the courts.

The jurisdiction is twofold: to bind over to keep the peace (surety of the peace), and to bind over to be of good behaviour (surety of good behaviour). There is lack of an authoritative definition of what constitutes a breach of the peace. A battery is clearly a breach of the peace, and so is an assault in the sense of a threatened battery. A prize fight is a breach of the peace even

[1] [1952] 2 K.B. 198.

though the parties consent. Each of these instances involves some danger to the person, and it is submitted that this is the meaning of a breach of the peace for the present purpose.[2]

A mere noise, amounting perhaps to a public nuisance, is not sufficient. In *Beaty* v. *Glenister* (1884),[3] members of the Salvation Army marched through the streets making discordant noises and shouting Alleluia; they were followed by a mob of 400 hostile persons who were also making a noise. The members of the Salvation Army were acquitted of "disturbing the public peace" within a local Act. The term "peace" in its popular sense sometimes means quietude, but this is not its legal meaning. Nor, in the present context, does it refer to the King's peace that in historical theory underlay the criminal law. Every crime is a breach of the royal peace, but the notion of crimes involving a breach of *the* peace is a specific one.

That the power to bind over to keep the peace depends upon evidence that the complainant was in danger of personal violence from another by reason of threats (express or implied from conduct), or of an actual assault, is shown by *R.* v. *Dunn* (1840).[4] It was there held that continual pestering of a woman by a man was not enough.

R. v. *Dunn* was concerned with binding over to keep the peace, and decided nothing with regard to the power to bind over to be of good behaviour. There is no doubt that this power is wider than and inclusive of the former, so that the restrictions on the former power are apt to be illusory; they can so easily be circumvented by relying on the latter.

It is clear that a person may be bound over to be of good behaviour if he has committed or threatened any criminal offence, whether or not it involves any blemishing of the peace on his part, and whether or not the offence is otherwise within the jurisdiction of magistrates. Thus he may be bound over for libel.[5] According to *R.* v. *Sandbach* [6] the sum for which surety is required by the magistrates may lawfully be greater than the maximum fine that could be imposed for the offence itself. This enables magistrates to make an order against habitual offenders where the maximum fixed by statute is too low for deterrence.

The decision must now be accepted, and is certainly salutary in practice, though it may be thought to overlook the principle expressed in *R.* v. *Hurle-Hobbs*,[7] affirming earlier cases, that when

[2] *Cf. Halsbury*, ix 311. A person may be bound over although the occasion on which the breach was feared has passed: *R.* v. *Little and Dunning* (1909) 101 L.T. 859; 74 J.P. 7; 26 T.L.R. 8; 22 Cox 225.
[3] 51 L.T. 304.
[4] 12 A. & E. 599.
[5] *Per* Avory J. in *Lansbury* v. *Riley* [1914] 3 K.B. at 237; *cf. R.* v. *Sandbach* [1935] 2 K.B. at 197; 2 J.Cr.L. 289; 8 *ibid.* 241.
[6] [1935] 2 K.B. 192.
[7] [1945] K.B. 165.

Parliament has laid down a penalty for an offence it is not open to resort to a different process to compel compliance with it. Some magistrates have used the power extensively against prostitutes; the statutory fine for soliciting is 40s., but by means of the weapon of binding over this can in effect be increased without limit.

Lansbury v. *Riley*[8] decided that a person who incited militant suffragettes to commit crimes (*e.g.*, of malicious damage) could be bound over to be of good behaviour, although no one had been put in bodily fear. The case is well in line with others and contributed nothing new.

It must next be inquired whether there is power to bind over for immoral or anti-social conduct not amounting to an actual or threatened breach of the criminal law. Under the Unlawful Games Act, 1541, s. 9, an antiquated statute passed (according to its preamble) in order to maintain interest in archery, there is power to bind over those who frequent gaming houses, requiring them "no more to play, haunt, etc." such houses. The recognisance cannot be enforced by courts of summary jurisdiction, and it is therefore now the practice to bind over to be of good behaviour under the general power.[9] The jurisdiction may perhaps be justified as coming within the spirit if not the letter of the Act of 1541.

In an Irish case it was held that a person could be bound over where he incited others to non-payment of rent, which was in itself merely the tort of inducing a breach of contract.[10] However, the court assumed that the party was a member of a criminal conspiracy (the "National Land League"); and accordingly the case cannot be taken as authority for saying that the expectation of a mere tort is sufficient ground for binding over.

The first and only decision of a superior court countenancing an extended view of the power is the comparatively recent case of *Wilson* v. *Skeock*.[11] A Divisional Court there held that a person may be bound over on account of insulting language, which may provoke the person to whom it is directed to break the peace. Insulting language is not in itself a criminal offence; it is an offence in some circumstances under the Public Order Act, but those circumstances were not present in *Wilson* v. *Skeock*. It may be that Denning L.J. overlooked this decision in his pronouncement quoted at the beginning of this article.

On the other hand, the decision in *Wilson* v. *Skeock* is itself difficult to reconcile with sound principle, particularly with the principle enunciated by Dicey that "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct

[8] [1914] 3 K.B. 229.
[9] *Murphy* v. *Arrow* [1897] 2 Q.B. 527 (betting house); *Roden* v. *Brett* [1936] 2 All E.R. 136.
[10] *Reynolds* v. *Justices of Co. Cork* (1882) 10 L.R.Ir. 1.
[11] 65 T.L.R. 418; 113 J.P. 294; [1949] W.N. 303.

breach of law established in the ordinary legal manner before the ordinary courts of the land."

The decision might conceivably have been justified as being only a slight extension of the traditional powers of the justices to preserve the peace. Insulting words are peculiarly likely to lead to a disturbance. In particular, reference may be made to the old jurisdiction to punish common scolds. Some texts assume that the common scold was a woman, and doubtless this was the usual case; but it seems that a man could also be punished if he was a "railer and sower of discord among neighbours."[12] The jurisdiction belonged to the court leet, and there were special engines of punishment such as the ducking stool.

Common scolds are discussed in a curious chapter in *Russell*, along with eavesdroppers and night-walkers. Eavesdroppers are defined in *Termes de la Ley* as "such as stand under walls or windows by night or day to hear news, and carry them to others, to make strife and debate amongst their neighbours." They were punished in the leet or the sheriff's tourn.[13] The offence is now obsolete, but is still sometimes made the reason for binding over.[14]

The third offence, night-walking, is suggested by Russell to have been connected with the curfew. It is as dead as the curfew itself; yet its ghost is sometimes used to justify binding over.

One might by a stretch say that the binding over of eavesdroppers and common scolds is justified because these are ancient offences, even though the courts that formerly punished them have gone out of existence, and even though there is no court with jurisdiction to punish them at the present day. But magistrates have gone beyond this, punishing those who have not committed or threatened any breach of the criminal law. Thus a man was bound over for breaking into a house—which, in the absence of felonious intent or actual damage, was a mere civil trespass.[15] So also the power was used against a man who went into ladies' lavatories,[16] which again was presumably a civil trespass on his part but no criminal offence.

Magistrates have even bound over where there was no breach of law of any kind actual or threatened. They have bound over for transvestism,[17] and for prostitution of a character that does not

[12] *Cf. Smith* v. *Pannell* (1618) Hobart 246.

[13] For a prosecution in 1391 see *Leet Jurisdiction in Norwich*, Selden Society, v. 70.

[14] 97 L.J. Newsp 600; Stone, *op. cit.*; *Encyclopaedia of the Laws of England*, s. v. Eavesdropping. According to (1943) 53 Law Notes 131, a man was in April of that year "convicted" of eavesdropping; but no details are given.

[15] 15 J.Cr.L. 351. *Cf.* 2 *ibid.* 321 (climbing along roof).

[16] 13 J.Cr.L. 226. An attempt was even made to have a person bound over on an allegaton that he had peered through the window of a ladies' lavatory: 16 J.Cr.L. 213.

[17] 15 J.Cr.L. 9, 146 (wearing clothes of the opposite sex). In an important article in 102 J.P.Jo. 135 it is pointed out that cross-dressing, in itself a harmless eccentricity, is not an offence, though it may of course be part of some criminal scheme.

amount to a breach of law. It is extraordinary that the humblest judicial functionaries should thus be able to indulge their fancy by formulating their own standards of behaviour for those who come before them. True, the power may be employed in a beneficial way. It was used to meet the problem, experienced in both world wars, of young girls who haunted military camps for the purpose of promiscuous associations.[18] When such girls were within juvenile court age they could be dealt with under the care and protection provisions, but outside that neither juvenile law nor the ordinary criminal law gave the police any powers. The neglect of Parliament to deal with this serious social problem meant that some magistrates' courts fell back upon the weapon of binding over. Beneficent though the result was, it is a notable infringement of civil liberty that persons should be brought before a court for conduct that is not the breach of any legal rule.[19]

No superior court has yet had to pronounce upon these extreme assumptions of power, but such dicta as appear in the cases seem to favour them. In *R.* v. *Queen's County JJ.* (1822),[20] Fitzgerald J. said that the power to require sureties for good behaviour is "a wide judicial discretionary power, to be exercised with great caution and not capriciously, and as it is capable of being abused, to be jealously watched over by this court." In *R.* v. *Sandbach*,[21] Humphreys J., approving Blackstone, said that justices can bind over "for causes of scandal, *contra bonos mores*, as well as *contra pacem*." The question was also discussed by Lord Goddard C.J. in *R.* v. *County of London Quarter Sessions Appeals Committee*.[22] The actual decision in the case was that no appeal lay to quarter sessions from an order of a magistrate binding over a person to be of good behaviour, and, as Humphreys J. pointed out, whether the magistrate was justified in acting as he did was a question that did not arise in those proceedings. Lord Goddard, however, in his judgment gave a wide interpretation to the power to bind over. He said :

> "There is a consensus of opinion to be found in the books, extending back for some four hundred years, that this Act, which was described by both Coke and Blackstone as an Act for preventive justice, does enable justices at their discretion to bind over a man, not because he has committed an offence,

[18] For a description of this problem see Lilian Wyles, *A Woman at Scotland Yard* (London 1952) 33 *et seq.*

[19] See the letter to *The Times*, December 3, 1951, from the General Secretary of the Association for Moral and Social Hygiene. While recognising the good intentions of the police, the letter regarded this extension of the law as "an alarming violation of civil liberties which sets up the local chief constable as the director of a *police des moeurs*. So far it has also had the marked peculiarity that it penalises the woman and entirely ignores the man, who, nevertheless, usually does the booking of the [hotel] room and signs the register."

[20] L.R. 10 Ir. at 303; 15 Cox at 155.

[21] [1935] 2 K.B. 192.

[22] [1948] 1 K.B. 670.

but because they think from his behaviour he may himself commit or cause others to commit offences against the King's peace. It is abundantly clear that for several centuries justices have bound by recognisances persons whose conduct they consider mischievous or suspicious, but could not, by any stretch of imagination, amount to a criminal offence for which they could have been indicted. In Dalton's *Countrey Justice*, a work of the highest authority, a catalogue is given, not intended, I think, to be exhaustive, of a large number of instances which would justify sureties for good behaviour being taken. He starts with rioters and barrators, and goes on to such cases as nightwalkers and eavesdroppers, suspected persons who live idly and yet fare well or are well apparelled, having nothing whereon to live, and common gamesters. None of these were ever indictable offences. . . . Though it is said in *Russell on Crimes* that eavesdropping was dealt with in the Sheriff's Tourn and Courts Leet as an offence, so far as I am aware no instance can be found in the books of any indictment being preferred for this offence at common law. It follows, therefore, that nobody can be convicted of eavesdropping or nightwalking, or of many of the other matters which are mentioned by Dalton, although no doubt in modern times the necessity for good government in towns and cities has caused the legislature to pass Acts which made what in earlier days were regarded as no more than bad behaviour, criminal offences."

One may, with every respect, lament the approval apparently given by this passage to the possibility of binding over nightwalkers and persons who live idly and yet fare well, and also the lack of clear definition of the legal power.

The Procedure for Binding Over

The lack of adequate safeguards in the present law of "preventive justice" extends to the realm of procedure.

Although application may theoretically be made to the High Court or quarter sessions, in practice the power of binding over is exercised by petty sessional courts.

Until the case *Everett* v. *Ribbands* there was sometimes thought to be a distinction between binding over to be of good behaviour generally, and binding over to be of good behaviour towards a particular complainant. The former was regarded as being practically unregulated by statute, while the latter was clearly governed by section 25 of the Summary Jurisdiction Act, 1879, now section 91 of the Magistrates' Courts Act, 1952.

It is convenient to commence the discussion by considering the position at common law. The procedure at common law was of ruthless efficiency. Application to have a person bound over might be made to a single magistrate, by information on oath followed by a warrant. Alternatively the magistrate might issue a summons,

following it with a warrant if the summons were disobeyed. Neither warrant nor summons was necessary if the defendant were already in court on some other charge. Incredible as it may appear, the defendant was not allowed to give evidence contradicting the complainant's allegations, and he was not even allowed to cross-examine the complainant and his witnesses.[23] There was no power to award costs.

A change was made by the section referred to above. This provides, in its present form, that "the power of a magistrate's court on the complaint of any person to adjudge any other person to enter into a recognisance, with or without sureties, to keep the peace or to be of good behaviour towards the complainant shall be exercised by order on complaint." Where it applies, the section makes five changes in the position as it existed at common law. The complaint must be heard by a magistrates' court consisting of at least two justices (or of a stipendiary or London magistrate). No warrant can be issued in the first instance, but only for disobedience to the summons. The defendant can dispute the complainant's allegations, and costs can be given to either party.[24] If the defendant is ordered to enter into a recognisance and fails to do so, the period for which he may be imprisoned is limited to six months.

These amendments to the law are so obviously just and right that it might be thought that the old law would have been entirely superseded. But, according to the literal words of the section, this is not so, because the section is limited to cases where the recognisance is to be of good behaviour *towards the complainant*. It does not, on its terms, apply where the recognisance is to be of good behaviour generally, or to be of good behaviour towards a third party. It is true that magistrates have shown better sense than Parliament, because in practice for many years all cases have been heard in properly constituted petty sessional courts, with the defendant being heard in contradiction of the complaint.[25] But, on a literal view, the defendant would have no legal remedy if he were refused a hearing; and costs cannot be given.[26]

The argument that the older procedure survives is supported by cases which decide in effect that the statutory safeguard requiring a complaint is illusory. It is common practice for a

[23] The last of a chain of cases on this point in the regular reports (33 E. & E. Dig. 385) is *Lort* v. *Hutton* (1876) 45 L.J.M.C. 95; 33 L.T. 730; 40 J.P. 677. The danger of abuse was strikingly manifested in *Bent* v. *Ingle* (1878) 66 L.T.N. 138.

[24] These two provisions were expressly contained in S.J.A., 1879, s. 25; they are omitted from the consolidation Act of 1952, s. 93, but can be collected from *ibid.*, ss. 45 and 55.

[25] As in the case noted in 16 J.Cr.L. 213.

[26] Yet a magistrate awarded costs in the case noted in 17 J.Cr.L. 1.

person arrested by the police [27] to be bound over without charge; and the courts hold that if a person is brought before the justices on any charge he may be bound over [28]; even a prosecutor may be bound over as the result of the hearing, although no process of any kind has been served on him.[29] In these circumstances, if the procedure is to be justified by reference to the old law, it would seem that the recognisance should be to be of good behaviour towards "Her Majesty and all her liege people," and not towards a particular person, for under the statute a recognisance towards a particular person seems to require a formal complaint. However, the courts have not applied this distinction, upholding orders for a recognisance towards a named person although there had been no complaint,[30] the statute not being cited. It may perhaps be argued in support that where there is no complaint against the person bound over, there is no complainant, and consequently the recognisance may validly be towards a particular person. But this interpretation really renders the section nugatory, and on a reasonable construction it requires a complaint.

Lord Goddard C.J. seems to have thought in 1947 that binding over could still be by a single justice.[31] He did not advert to the Summary Jurisdiction Act, and either his remarks were *per incuriam* or he must have thought that section 25 was confined to binding over towards a named person.

Everett v. *Ribbands*, to which reference was made at the beginning of this article, puts the matter in a different light. At common law a party bound over to keep the peace or be of good behaviour could bring an action for malicious prosecution, or rather malicious process, although the proceedings had not terminated in his favour, the reason being that he had not been allowed by law to answer the charge.[32] In *Everett* v. *Ribbands* the question arose whether the law was still the same. A police officer laid a complaint [33] against Everett, stating that it was laid on behalf of a woman, Ribbands, alleging that Everett had sent offensive

[27] *e.g.*, under the Unlawful Games Act, 1541; Metropolitan Police Act, 1839, s. 64; City of London Local Police Act, 1839 (2 & 3 Vict. c. xciv), s. 18; Municipal Corporations Act, 1882, s. 193; all save the first giving power to apprehend idle and disorderly persons disturbing the public peace.

[28] *Ex p. Davis* (1871) 24 L.T. 547; 35 J.P. 551; *Ex p. Harken* (1889) 24 L.R.Ir. 427; *Wilson* v. *Skeock*, below.

[29] *R.* v. *Wilkins* [1907] 2 K.B. 380. But most magistrates prefer to have a formal complaint and hearing, *e.g.*, by cross-summons, unless the party consents to be bound over.

[30] *R.* v. *Wilkins*, last note; *Wilson* v. *Skeock*, 65 T.L.R. 418; 113 J.P. 294; [1949] W.N. 303, where the recognisance was "to keep the peace towards His Majesty and all his liege people and especially towards the complainant." The so-called complainant was in fact a criminal informant under the Public Order Act; there was no complaint within s. 25 of the Act of 1879.

[31] *R.* v. *County of London Q. S. Appeals Committee* [1948] 1 K.B. at 676.

[32] *Steward* v. *Gromett* (1859) 7 C.B.(N.S.) 191; 141 E.R. 788.

[33] In [1952] 1 K.B. 112 it is called an information, but this seems to be a mere misnomer. There is considerable laxity in the use of the words "information" and "complaint."

letters to Ribbands, and calling on him to show cause why he should not be ordered to find sureties for good behaviour. The magistrate bound Everett over to be of good behaviour, having evidently accepted evidence from Everett in his own defence in accordance with the current practice. Everett sued Ribbands and the officer for malicious process. It was held by Devlin J. and the Court of Appeal that by section 25 of the Summary Jurisdiction Act, 1879, the procedure for binding over was no longer *ex parte*, but the defendant was entitled to be heard in his own defence; consequently he could not sue for malicious process where the proceeding had not terminated in his favour.

This extensive interpretation of section 25 (now section 91 of the Act of 1952) gives a satisfactory result; but it is impossible to reconcile it logically with the other cases holding that section 25 can be by-passed in its requirement of a complaint.

The decision in *Everett* v. *Ribbands* reinforces the general impression that six months is the limit of imprisonment that may be awarded for refusing to be bound over or failing to find sureties. This matter has a curious history. It seems that at common law there was no limit to the period of imprisonment that justices might impose. By an Act of 1853 the period was restricted to one year,[34] but this provision was repealed by the Statute Law Revision Act, 1892, probably on the assumption that section 25 of the Act of 1879 (which restricted the period of imprisonment to six months) applied to all cases of sureties. It was open to argument that the assumption was incorrect, but *Everett* v. *Ribbands* now supports it. So also it seems to follow from this decision that a warrant cannot now be properly issued in the first place.

It is strange that magistrates have no power to fine in lieu of imprisoning. Still more strange is it that a defendant may, although he has not broken the law, be required to find sureties and be punished in default. It would seem that the requirement of sureties should be restricted to a case where a breach of the criminal law is proved.

There is no limit to the amount of surety that magistrates may require, and no limit to the time for which they may be required. A superior court in one case bound over for seven years[35]; and magistrates have been upheld in binding over for two years.[36]

A remarkable extension of the law was made in *Trueman* (1913),[37] where it was held that a person convicted of an offence and awarded the maximum punishment might on the same facts be bound over. In the actual case, the statutory maximum for the

[34] 16 & 17 Vict. c. 30, s. 3.
[35] *Williams* (1790) 1 Leach 529.
[36] *Willes* v. *Bridger* (1819) 2 B. & Ald. 278.
[37] [1913] 1 K.B. 164 (C.C.A.). The decision renders otiose the express provisions in the Offences against the Person Act, 1861, s. 43, and the Licensing Act, 1902, s. 3.

particular offence was one year's imprisonment; Avory J. sentenced the offender to the maximum term, ordered him to find sureties at the end of the term to be of good behaviour for a further year, and ordered that in default of finding sureties he be imprisoned for that further year. The judgment was affirmed on appeal. The device seems to be a questionable way of evading the statutory maximum; and if it extends to lay justices (which is not certain) it defeats restrictions upon their power that Parliament has deemed necessary in the public interest.

What constitutes a breach of recognisance justifying forfeiture? It is clear that the commission of a crime involving a breach of the peace would be so, but what other conduct would be covered is not at all clear. It is a possible opinion that what is cause for binding over is if repeated a breach, and that an act may be a breach even though far removed from the original source of complaint. If this is so, it follows that a person bound over may be subject to a law different from that affecting his fellow subjects, and a law that rests to a large extent in the discretion of the magistrate. This may not be the correct view, but it would make things clearer if Parliament reworded the standard form of recognisance so that the defendant is expressly told what he can and cannot do. There is a legislative precedent for this development in the field of probation, which need no longer involve a recognisance to be of good behaviour. The form of probation order requires that the defendant "shall lead an honest and industrious life"[38]; this, though still somewhat vague in respect of the requirement of industry, is much more informative than the general requirement of good behaviour. Yet Parliament has countenanced the "good behaviour" formula in other contexts: a parent or guardian may still be ordered to give security for the good behaviour of a child or young person,[39] and any person may be allowed to give security for a probationer's good behaviour.[40]

The procedure for forfeiture is now contained in the Magistrates' Courts Act, 1952, s. 96. Where, on complaint, the recognisance appears to the court to be forfeited, the court may so declare and may adjudge the principal and sureties to pay the sum in which they are respectively bound.[41] There seems to be no procedure for serving notice of the complaint on the sureties, and it appears to be possible for them to be bound by an adjudication based on evidence that they have had no opportunity of challenging.

[38] Form 66 in Schedule to Summary Jurisdiction Rules, 1949, S.I. 1949, No. 1405. But John Watson, *The Child and the Magistrate*, revised ed. (1950), p. 155, says that many courts—including the metropolitan juvenile courts—still make a practice of inserting words requiring good behaviour.

[39] Children and Young Persons Act, 1933, s. 55 (2).

[40] Criminal Justice Act, 1948, s. 11 (1).

[41] If the recognisance was in writing it must be produced in court: *McGarry* (1945) 30 C.A.R. 187. The accused must be informed precisely of the breach alleged, an advocate should be briefed for the prosecution, and proper evidence of the breach must be given: *McGregor* (1945) 30 C.A.R. 155.

The width of discretion given to magistrates, with its inherent danger of abuse and oppression, might be more tolerable if the law relating to appeals were not in such a discreditable state. Being bound over is, at the least, a stain on a person's character; yet, since it is not technically a conviction, no appeal lies from petty to quarter sessions.[42] There are some fragmentary substitutes for a proper appeal: a case may be stated; the court will interfere by habeas corpus if the proceedings are insufficient on their face[43]; and there is a remedy by certiorari the extent of which is not precisely known.[44]

The lack of provision for appeal extends to the adjudication of a forfeiture.[45] Yet, owing to the special wording of an Act relating to London, there is a wider right of appeal from the metropolitan courts, which covers the forfeiture of recognisances.[46] Lord Reading C.J. said in 1920: "It may be that it is undesirable that there should be a difference in practice in London and the rest of the country as regards the right of appeal from courts of summary jurisdiction; but if uniformity of practice is to be secured in this respect, it must be by Act of Parliament."[47]

In the Criminal Justice Act, 1948, s. 7, Parliament provided a new machinery of conditional discharge which was intended to take the place of binding over without supervision. This machinery is free from the defects of the system of binding over; in particular, since there is a conviction an appeal lies against the order, and the condition attached to the order is broken only by the commission of an offence. Thus the old process of binding over, with its vexatious incidents, is no longer needed against offenders. It is now distinctively a weapon to be used against those who have not broken the criminal law.

Glanville Williams.*

[42] *R.* v. *London County Q. S., ex p. Beaumont* [1951] 1 K.B. 557; for a criticism of the law see 64 L.Q.R. 312.

[43] *R.* v. *Dunn* (1840) 12 Ad. & E. 599.

[44] Older cases showed a reluctance to interfere with the finding of magistrates, but they were decided before the modern procedure under which the defendant may give evidence in contradiction of the complaint. An Irish court allowed certiorari to issue for a deficiency of evidence before the magistrates: *R.* v. *Londonderry JJ.* (1891) 28 L.R.Ir. 440; *cf.* Stone, *Justices Manual*, 83rd ed., 301 *et seq.*

[45] *R.* v. *Durham JJ., ex p. Laurent* [1945] K.B. 33.

[46] *Cockhill* v. *Davies* (1943) 59 T.L.R. 259.

[47] *Mittelman* v. *Denman* [1920] 1 K.B. 519.

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THE BENEFIT OF RESTRICTIVE COVENANTS
A SURVEY

Lord Justice Romer has observed,[1] in connection with the law of restrictive covenants running with the land, that "the established rules concerning it are purely arbitrary, and the distinctions, for the most part, quite illogical." A consideration of the law as to the passing of the benefit of such covenants, as laid down in a steady flow of cases reported between *Renals* v. *Cowlishaw*[2] and the recent case of *Newton Abbot Co-operative Society* v. *Williamson & Treadgold*,[3] seems fully to justify this complaint. To resolve the arbitrary rules and illogical distinctions into any coherent and consistent principles, it is necessary to trace the historical development of this branch of the law from the days before equitable intervention, when covenants were the concern of the courts of common law.

It was early held[4] that the benefit of a covenant can run with the land at law, but it was probable that the benefit of a lessee's covenant did not run with the reversion, hence on the dissolution of the monasteries the Grantees of Reversions Act provided that the reversioner could sue on the lessee's covenants. This statute was interpreted as applying only to covenants which "touched and concerned" the land,[5] and the Third Report of the Real Property Commissioners in 1834 observed that, whilst these rules were laid down with reference to leases, authorities were not wanting in which they had been treated as applying equally to cases not involving the relation of landlord and tenant. *Spencer's Case* was, however, never extended to freehold land, and although the point has never been expressly decided, it is now accepted that the burden of a vendor and purchaser covenant cannot run with the land at law.[6] The only legal right, therefore, was a right to sue the covenantor and his personal representatives, and this legal right was not severable—it must be assigned as a whole or not at all.

The importance of the doctrine in *Tulk* v. *Moxhay* is that it enables a restrictive covenant to be enforced in equity against an assign of the covenantor. Thus it was possible for a legal and an

[1] In *Grant* v. *Edmondson* [1931] 1 Ch. 1.
[2] (1879) 11 Ch.D. 866; 48 L.J.Ch. 33, 830 (which is slightly fuller).
[3] [1952] Ch. 286.
[4] *The Prior's Case* (1368) Y.B. 42 Edw. 3 fo: 3, pl. 14; Co.Litt. 385a. That this is one of the very few authorities for this proposition probably accounts for its citation in several comparatively recent cases: *Rogers* v. *Hosegood* [1900] 2 Ch. 388; *Forster* v. *Elvet Colliery* [1908] 1 K.B. 629; *Re Ballard* [1937] Ch. 473.
[5] *Spencer's Case* (1583) 5 Co.Rep. 16a.
[6] See *Austerberry* v. *Oldham Corpn.* (1885) 29 Ch.D. 750, *per* Lindley and Fry L.JJ.; *Zetland* v. *Driver* [1939] Ch. 1, *per* Farwell J.; *Re Fitzherbert Brockhole's Agreement* [1940] Ch. 51.

equitable liability to coexist, for at law the original covenantor might remain liable, whilst in equity his assignee would incur liability, and since the benefit and burden of a covenant are necessarily complementary, it follows that an equitable benefit independent of the legal benefit was created. The classes, of course, overlap, for a covenant touching the land, whose benefit can pass at law, may also be a restrictive covenant in equity; and the legal benefit is twofold—there is always a contractual right exercisable by the covenantee and his personal representatives [7] and there may be, if the necessary conditions are fulfilled, a legal right passing to the successors in title of the land intended to benefit. The legal conditions for annexation were that the covenantee must hold the legal estate in the dominant land, and hold it under the same title as the original covenantor,[8] and that the covenant must touch and concern the land.

The result of the creation of the new equitable liability was that it was open to the court of equity to prescribe the particular class of assignees to whom it should concede the benefit of the rule.[9] In doing so, it followed the law in requiring that the covenant should touch and concern the land, but it included in the class of beneficiaries persons to whom the benefit of the covenant could not have been assigned at law.[10] Equity supplemented the law in granting additional remedies, in not requiring a legal estate in the covenantee, and in allowing several assignments of the benefit of a covenant. At the same time, the rules for annexation were refined, for the paucity of cases on the subject at law had led to some vagueness in the necessary requirements. The rules of equity, as they now stand, may be summarised as follows:

(1) The covenantee must retain land in which he has an interest;
(2) There must be an intention to annex the benefit to that land;
(3) That land must be so defined as to be clearly ascertainable; and
(4) The covenant must touch and concern that land.

[7] It is submitted that only on this ground can the troublesome case of *Ives* v. *Brown* [1919] 2 Ch. 314, be reconciled with the state of the law, for it was an action by an executor of the last surviving covenantee against the trustees of the will of the covenantor. The contractual liability is, of course, the reason for the frequency of indemnity covenants in conveyances.

[8] *Webb* v. *Russell* (1789) 3 Term Rep. 393. This case, decided on a leasehold covenant, has been treated as applying at law also to freehold covenants: *Rogers* v. *Hosegood*, *supra*. See also Holmes, "The Common Law," Lect. XI, pp. 395–98.

[9] *Re Union of London and Smith's Bank, Ltd.'s Conveyance* [1933] Ch. 611, *per* Romer L.J.

[10] *Rogers* v. *Hosegood*, *supra*, where the plaintiff being a mortgagor had only an equitable estate. This does not support the dictum of Clauson J. in *Re Ballard*, *supra*: "The question who can be sued on the covenant . . . may depend on equitable considerations. When, however, the question is who can sue on such a covenant, the question becomes one of law in the strict sense."

The true relation between annexation and assignability is, it is submitted, that laid down by Hall V.-C. in his judgment in *Renals* v. *Cowlishaw*—a judgment which has been approved by the Court of Appeal and the House of Lords[11]: "In order to enable a purchaser as an assign (such purchaser not being an assign of all that the vendor retained when he executed the conveyance containing the covenant, and that conveyance not showing that the benefit of the covenant was intended to enure [*qu.*, to the owner] for the time being of each portion of the estate so retained or of the portion of the estate of which the plaintiff is assign) to claim the benefit of a restrictive covenant, this at least must appear, that the assign acquired his property with the benefit of the covenant, that is, it must appear that the benefit of the covenant was part of the subject-matter of the purchase."

This is the only clear, precise and logical statement of the relationship between annexation and assignment in any reported case. It presupposes that the benefit of the covenant is annexed to a plot of land, so that if a purchaser buys the whole of that plot he automatically takes the benefit of the covenant; he also takes the benefit without express assignment if it has been annexed to each portion of the land, or to the particular portion which he buys. But in any other case, although the benefit is annexed to the land as a whole, a purchaser of part only of that land cannot enforce the covenant unless he takes an assignment of its benefit.

A further point in connection with *Renals* v. *Cowlishaw* is relevant to a consideration of the later authorities. The Vice-Chancellor introduced the question of motive, saying that the expressed or otherwise apparent purpose of a covenant, whether it was intended to be annexed to other property or was only taken in order to enable the covenantee to deal more advantageously with his own property, was important. This passage of his judgment was an echo of the Court of Appeal judgments in *Master* v. *Hansard*[12] where it was held that a covenant by a lessee of an hotel was not enforceable by the lessee of adjoining property of the freeholder, the Lords Justices observing that the covenant was entered into "not for the benefit of the adjoining land, but for the benefit of the owner of the estate, that he might be able to make the most of it" and "for the benefit of the lessors, to enable them to make the most of the property they retained." The extension of this

[11] See *Spicer* v. *Martin* (1888) 14 App.Cas. 12, *per* Lord Macnaghten: "I should be disposed to hesitate if I were invited to extend the principles recognised in *Renals* v. *Cowlishaw*."

[12] (1876) 4 Ch.D. 718, which Hall V.-C. said "governed" the case of *Renals* v. *Cowlishaw*.

reasoning to freehold covenants was bound to cause confusion [13]—leasehold covenants are annexed to the immediate reversion by reason of the privity of estate; freehold covenants can be annexed only to adjacent land.

The implication of the theory of motive, as stated by Romer L.J. in the *Union Bank Case*, is that if a restrictive covenant is taken not merely for some personal purpose of the vendor, but for the benefit of some other land of his, in the sense that it would enable him to dispose of the land to greater advantage, the covenant, though not annexed to such land so as to run with any part of it, may be enforced against an assignee of the covenantor taking with notice, both by the covenantee and by persons to whom the benefit of such covenant has been assigned, subject to certain conditions, namely :

(1) The covenantee must retain some land,

(2) This land must be ascertainable or certain, and

(3) This land must be capable of being benefited.

A comparison with the requirements for annexation [14] is instructive :

(1) The covenantee or his successors in title must retain some part of the land,

(2) The land must be so defined as to be clearly ascertainable, and

(3) The covenant must touch or concern the land, *i.e.*, it must be imposed for the benefit of land of the covenantee. (This appears to be merely the active version of the passive requirement for assignability.)

It is significant that Romer L.J. presupposes that the covenant is not annexed to the land " so as to run with any part of it " and it is submitted that an assignable covenant is annexed to the land as a whole, and that the *Law Reports* headnote of the *Union Bank Case*: " An assign of the covenantee's land cannot enforce the covenant against an assign (taking with notice) of the covenantor unless . . . he is an express assign of the benefit of the covenant " is inaccurate and should begin: " An assign of part of the covenantee's land . . ." It is significant also that in the course of time, the requirement originating in *Master* v. *Hansard* has been inverted —there covenants which were entered into " not for the benefit of the adjoining land " were thought to be assignable; now covenants to be assignable must be entered into " for the benefit of some other land " of the covenantee.

[13] *Cf.* Romer L.J. in *Grant* v. *Edmondson* [1931] 1 Ch. 1, " In connection with the subject of covenants running with the land, it is impossible to reason by analogy." The general tenor of the judgment of Hall V.-C. suggests that *Master* v. *Hansard* may have been adduced as an indication that there was no building scheme in this particular case: here intention is a very relevant factor.

[14] As set out by Farwell J. in *Zetland* v. *Driver*, *supra*.

In the light of this, it is submitted that motive is relevant only to a consideration of the question whether a covenant is intended to be annexed or is merely personal, and that assignable covenants are merely those which are annexed to land as a whole though not to every part of it.[15] Where, as in one of the covenants under consideration in the *Union Bank Case*, the vendor covenanted with "the purchasers their heirs and assigns or other the owner or owners for the time being of the land coloured pink or any part or parts thereof" a successor in title of the covenantee retaining some of the land coloured pink would automatically take the benefit of the covenant, without the necessity for any express assignment. In any other case, "it must appear that benefit of the covenant was part of the subject-matter of the purchase."

The importance of the recent case of *Newton Abbot Co-operative Society* v. *Williamson & Treadgold* is that it is the first reported decision[16] where a distinction has been drawn between the requirements for annexation and assignability. The conveyance under consideration contained nothing to identify the property intended to benefit, and Upjohn J. accordingly held that the covenant was not annexed to property in fact retained by the vendor. He also held that, whilst the property must be "ascertainable" for the purposes of assignability, he was entitled to look at the surrounding circumstances to see if the land was identified with reasonable certainty, notwithstanding the absence of documentary evidence. There is some conflict of authority as to what evidence is admissible to identify the dominant property in annexation cases, and the decision on the nature of the evidence admissible is a minor one. The importance of the decision is that for the first time a covenant enforceable against an assign of the covenantor has been held not to conform to the requirements for annexation. The history of this particular requirement is again interesting:

(1) In *Renals* v. *Cowlishaw*, James L.J. held: "If you do not find express reference in the deed to some particular property for the benefit of which the restrictive covenant has been entered into, an assign cannot take the benefit of the covenant."

(2) In *Rogers* v. *Hosegood*, Farwell J. distinguished between a restrictive covenant and a covenant for title, both entered into with the covenantee his heirs and assigns; in the former case "assign," he says, means on the true construction of the deed, assign of the

[15] The question at issue put by Greene L.J. in *Drake* v. *Gray* [1936] Ch. 451 (in a slightly different context) is most apposite; "Whether on the true construction of the conveyance the benefit of a restrictive covenant is annexed to the land as a whole or to the whole of the land."

[16] There were, however, dicta to the same effect in *Re Sunnyfield* [1932] 1 Ch. 79 (not cited in the *Newton Abbot Case*) where Maugham J. says: "In the absence of an express assignment . . . the purchaser of a piece of the adjoining land cannot claim the benefit of a restrictive covenant unless it appears that there is something in the deed containing the covenant to define the property for the benefit of which it was entered into."

covenant; in the latter, assign of the land.[17] The implication (which is not borne out by later cases) is that in *Renals* v. *Cowlishaw* the covenant was not annexed because the word "assigns" denoted assignability, and there had been no express assignment.

(3) In the *Union Bank Case*, Bennett J. followed the dictum of James L.J. and required that to enable an express assignee to sue, the deed containing the covenant must contain something to define the dominant property.

(4) On appeal in the same case Romer L.J. quotes with apparent approval the above remarks of Farwell J. and seems to treat "assigns" as a necessary word of limitation: "Now it may be conceded that the benefit of a covenant entered into with the covenantee or his assigns is assignable. The use of the word 'assigns' indicates this."[18] He continues with a requirement that the existence and situation of the dominant land must be indicated in the conveyance or be otherwise shown with reasonable certainty, without intimating whether "otherwise" is confined to documentary evidence.

(5) In the *Newton Abbot Case*, Upjohn J., to avoid following Bennett J. in requiring an express reference in the deed to identify the property in an assignment case, held that the word "assign" in *Renals* v. *Cowlishaw* meant assign of the land and not assign of the benefit of the covenant, and impressed that in *Renals* v. *Cowlishaw* there was no question of there being any assignment of the benefit of the covenant.

It cannot be pretended that the present state of the law with regard to the passing of the benefit of restrictive covenants is satisfactory, and perhaps this is due to the fact that in the century which has elapsed since *Tulk* v. *Moxhay* the House of Lords has had no opportunity of considering this branch of the law, except with regard to building schemes.[19] It is, however, suggested that the complexities of annexation and assignment have increased, are increasing and ought to be diminished, and that the statement of the law by Hall V.-C. in *Renals* v. *Cowlishaw* provides a logical and

[17] Here the analogy is doubly dangerous; a covenant for title always requires words of limitation and once annexed attaches to every part of the land, and the property benefited is the property conveyed, not other property of the vendor. "Assigns" in a restrictive covenant is normally interpreted as assigns of the land—*Re Ecclesiastical Commissioners' Conveyance* [1936] Ch. 430; *White* v. *Bijou Mansions, Ltd.* [1938] Ch. 351.

[18] In support of this statement Romer L.J. refers to *Williams on Personal Property*, 18th ed., pp. 32 and 33, which appear to contain nothing to support this proposition, and the decision in the *Union Bank Case* itself shows that such a covenant is not necessarily assignable. Nor is the word "assigns" an indispensable word of limitation: *Josselson* v. *Borst* [1938] 1 K.B. 723.

[19] *Spicer* v. *Martin*, *supra*. The law relating to building schemes is in a pleasant state of comparative certainty, though there are recent complications with regard to "quasi-building schemes," again arising out of the judgment of Farwell J. in *Rogers* v. *Hosegood*, *supra* (*White* v. *Bijou Mansions, Ltd.* [1938] Ch. 351) and sub-schemes (*Lawrence* v. *South County Freeholds, Ltd.* [1939] Ch. 656).

straightforward framework into which most of the subsequent decisions can be compressed, if not comfortably housed. It is to be hoped that the courts have some opportunity of clarifying the position before this province of the law is completely transferred from private law to public law.[20]

R. Geoffrey Rowley.*

[20] See Hanbury, *Essays in Equity*, pp. 80–81: "The keynote of modern social legislation is the conviction that it is idle to trust to the wisdom or benevolence of the individual. Certainly the individualism of *Tulk* v. *Moxhay* is moribund, and its requiem is being rehearsed . . . by the Town and Country Planning Act, 1932." Possibly the Town and Country Planning Act, 1947, is the dress rehearsal.

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"WRONG" IN THE M'NAUGHTEN RULES

THE High Court of Australia in *Stapleton* v. *The Queen* (1952) 86 Commonwealth Law Reports 358, refused to follow the recent decision of the English Court of Criminal Appeal in *R.* v. *Windle* [1952] 2 Q.B. 826 on the meaning of the word "wrong" in the M'Naughten rules. If one charged with murder had a "disease of the mind" at the time of the killing and knew the "nature and quality of his act," the question whether he "knew that what he was doing was *wrong*" becomes the phrase on which his life may hang: its meaning is not therefore of merely academic interest.

In delivering the unreserved judgment of the Court of Criminal Appeal (Lord Goddard C.J., Jones and Parker JJ.) in *Windle's Case*, Lord Goddard both posed the problem raised by the word "wrong" in the context of the defence of insanity and gave an answer to it. He said: "A man may be suffering from a defect of reason, but, if he knows that what he is doing is wrong—and by 'wrong' is meant contrary to law—he is responsible. Counsel for the appellant suggested that the word 'wrong' as it is used in the M'Naughten rules did not mean contrary to law, but had some qualified meaning—morally wrong—and that, if a person was in a state of mind through a defect of reason that he thought that what he was doing, although he knew it was wrong in law, was really beneficial, or kind, or praiseworthy, that would excuse him."

Confirming this interpretation, Lord Goddard concluded: "In the opinion of the court, there is no doubt that the word 'wrong' in the M'Naughten rules means contrary to law and does not have some vague meaning which may vary according to the opinion of different persons whether a particular act might or might not be justified." This is a clear acceptance of the "illegality" test first stated, and even more forcibly, by Lord Brougham in the debates in the House of Lords following the acquittal of Daniel M'Naughten: "there is only one kind of right and wrong; the right is when you act according to law, and the wrong is when you break it."

In their joint judgment in *Stapleton's Case*, Dixon C.J., Webb and Kitto JJ. dealt at length with their reasons for refusing to follow *Windle's Case*. Their analysis is the only reserved and careful and judicial interpretation that this limb of the M'Naughten rules has so far received; and their conclusion, that the accused's criminal liability here depends on his ability to reason about the wrongness of his act with a moderate degree of sense and composure, is in sharp conflict with the opinion of the Court of Criminal Appeal.

Such a disagreement, concerning rules propounded in 1843 and applied very frequently throughout the Anglo-American legal

systems since that date, is less surprising when it is appreciated what scant judicial consideration they have received. Indeed, this particular issue seems to have been expressly raised in England only in *R.* v. *Codère* (1916) 12 Cr.App.R. 21, where the Court of Criminal Appeal, in a judgment read by Lord Reading C.J. and described with generous meiosis in *Stapleton's Case* as "not free from ambiguity," did not effectively resolve the semantic difficulties inherent in asking a jury to decide whether the accused knew at the time of his homicidal act "that what he was doing was wrong."

The M'Naughten rules stand as an anomaly in our system of precedent. Themselves of no direct judicial force; expressly adopted as binding authority by Divisional Courts; interpreted generally (and inadequately) in only one English case—*R.* v. *Codère*; carefully explained to thousands of juries who may or may not understand the explanation or be prepared to apply the rules so explained to the particular emotionally disturbing case they have heard; and now nearly 110 years after their formulation precipitating conflict between the Court of Criminal Appeal in England and the High Court of Australia on a vital aspect of their interpretation.

If it be accepted, as can hardly be denied, that the answers of the judges to the questions asked by the House of Lords in 1843 are to be read in the light of the then existing case-law and not as novel pronouncements of a legislative character, then the High Court's analysis in *Stapleton's Case* is compelling. Their exhaustive examination of the extensive case-law concerning the defence of insanity prior to and at the time of the trial of M'Naughten establishes convincingly that it was morality and not legality which lay as a concept behind the judges' use of "wrong" in the M'Naughten rules. It is true, of course, that in most instances if a man knows that something is against the law he will also know that it is against the general morality of the community; but there are cases where this is not so and where the difference between these interpretations can be of decisive importance.

In *Stapleton's Case* the High Court gave a complete and convincing theoretical justification for the direction of Dixon J. (as he then was) to the jury on this point in *R.* v. *Porter* (1936) 65 Commonwealth Law Reports 182. His direction in that case was a model of precision and deserves more attention than it has yet received from the profession outside Australia. On the issue of the accused's knowledge of the wrongness of his act, Dixon J. said (at p. 189): "The question is whether he was able to appreciate the wrongness of the particular act he was doing at the particular time. Could this man be said to know in this sense whether his act was wrong if through a disease or defect or disorder of the mind he could not think rationally of the reasons which to ordinary people make that act right or wrong? If through the disordered condition

of the mind he could not reason about the matter with a moderate degree of sense and composure it may be said that he could not know that what he was doing was wrong." In *Stapleton's Case* this interpretation was expressly adopted, and there can be little doubt that it is a more technically accurate formulation of this limb of the M'Naughten rules than the bare perception by the accused of the illegality of his action accepted in *Windle's Case* and capable of being supported only on the basis of the judgment in *R.* v. *Codère*, which on this point was both obscure and unsupported by authority.

In trying Windle, Devlin J. withdrew the case from the jury, ruling that there was no issue of insanity to be left to them as it was common ground that Windle knew the illegality of giving the hundred aspirins to his wife. The Court of Criminal Appeal in interpreting the M'Naughten rules to allow such a substitution of judicial for jural discretion is considerably restricting the only virtue customarily claimed for these rules, that is, their flexibility. As a rigid, precise definition of a defence to a criminal charge they are woolly, semantically confused, psychologically immature nonsense; as a means whereby juries work rough justice in a difficult peripheral area of law and morality they are reasonably satisfactory. The minutes of the evidence before the Royal Commission on Capital Punishment make it abundantly clear that the M'Naughten rules can only be defended, even by their warmest supporters, as techniques whereby practical justice is reached, and not as absolute, precise legal rules.

Hard cases may make bad law but they search out our general principles. Mr. Madheart believes his wife is suffering from an incurable and overwhelmingly painful disease; believes it is his divine mission to release her to a happier level of existence; hears a clear voice commanding him to do so; knows that the law forbids him to relieve her from her suffering, but thinks that people generally sympathise with his desire to free her from such pain; and kills her. His wife is quite well and his beliefs are products of his psychosis, his " disease of the mind." He " knows the nature and quality of his act." Pursuant to *Windle's Case* he should be denied the defence of insanity (in practice, he will often be squeezed by sophistry and the jury's wisdom within the confines of the M'Naughten rules even if they are interpreted in this narrow way). Pursuant to *Stapleton's Case*, believing as he does in the general morality of his action and being unable to " reason about the matter with a moderate degree of sense and composure," owing to the force of his delusional system and the God-like voice hallucinated, he would, in those states of Australia where the M'Naughten rules apply, be declared " not guilty on the ground of insanity at the time of commission of the act charged."

In his *Criminal Responsibility*, Dr. Charles Mercier strenuously opposed the interpretation later accepted in *Windle's Case*, and

concluded (at p. 193): "As well might we convict of high treason the general paralytic who claims the crown of England. He knows that the world considers wrong the act that he does. He knows that it is against the law. But he does not know and appreciate the circumstances in which he acts."

In his authoritative *Insanity as a Defense in Criminal Law*, Weihofen took the same point. Examining the American authorities on this issue he suggested (at p. 42) one unfortunate result of rigidly applying the "illegality" test: "In Tennessee and Texas, it has been held that knowledge of the unlawfulness of the act is sufficient to render a defendant criminally responsible, and that an insane delusion that the deed was commanded by God, though known to be a violation of the temporal law, is no defense. Such a rule seems to hold responsible for crime persons suffering from some of the most dangerous types of mental disorder." American courts generally avoid this anomaly preferring to test the accused's knowledge of the morality of his act rather than its legality. The leading case on this point is *People* v. *Schmidt* (1915) 216 N.Y. 324, in which Cardozo J. reviewed the history of the M'Naughten rules and accepted this interpretation of their use of the word "wrong."

Sir James Fitzjames Stephen took a similar view to that later adopted in *Stapleton's Case*, writing (*History of the Criminal Law of England*, 1st ed., Vol. 11, p. 167): "The word 'wrong' is ambiguous. . . . It may mean either 'illegal' or 'morally wrong,' for there may be such a thing as illegality not involving moral guilt. . . . In *Hadfield's Case*, for instance, knowledge of the illegality of his act was the very reason why he did it. He wanted to be hung for it. He no doubt knew it to be wrong in the sense that he knew that other people would disapprove of it, but he would also have thought, had he thought at all, that if they knew all the facts (as he understood them) they would approve of him, and see that he was sacrificing his own interest for the common good. I could not say that such a person knew that such an act was wrong. His delusion would prevent anything like an act of calm judgment in the character of the act."

Prior to the decisions in *Windle* and *Stapleton*, and with *Codère* as authority, it was customary to teach the meaning of this limb of the M'Naughten rules in the following way. Ask the class to posit a completely honest person accused of murder who has "a disease of the mind," and who "knew the nature and quality" of his homicidal act. To discover whether he "knew that what he was doing was wrong" you ignore the rules of evidence and interrogate him as follows. His life may depend on the answers he gives and they are Erewhonian in their application.

Interrogator: "Did you think that what you did was wrong?"
Honest Accused: "No, I did not think it was wrong." (If yes, he may hang).

Interrogator: "Well then, did you think that most other people, seeing the facts as you saw them, would have agreed with you that it was right?"

Honest Accused: (1) "Oh, they don't understand. They think it's wrong, but they are terribly misguided"—he may hang as being sane.

(2) "Yes, most people would have agreed with me that in the circumstances as I saw them it was a right thing to do"—he is still within the defence of insanity.

Interrogator: (and this arises only if he gave the second answer to the previous question.) "Tell me then, did you realise that what you did was against the law?"

Honest Accused: (1) "Yes, I realised that; but the law is quite out of touch with morality. I, and everyone else know that what I did was right, but the law is hopelessly out of date on this"—he may hang as sane, such is the law's opinion of law reformers!

(2) "No, I thought that in all the circumstances the law allowed this"—he is still within the defence of insanity.

This was, at least, a comprehensible position. If the accused thought it right, and believed that both public opinion and the law agreed with him, he fell within the M'Naughten rules. If any one of these beliefs were lacking, that is, if he doubted the rightness of his act himself, or if he saw his belief in its rightness as in advance of and in disagreement with either the law or public opinion, then the defence of insanity was denied him. And it must be remembered that we are asking these difficult questions of a "diseased mind." *Windle's Case* left this position untouched, except that it tended to stress the importance of the third question, so that it might be wiser to question the "honest accused" concerning his knowledge of the law before you asked him about his ideas on generally held rules of morality. *Stapleton's Case* involves a denial of the force of the third question. After *Stapleton's Case* (except in Queensland, Tasmania and Western Australia where the M'Naughten rules do not apply, having been replaced by statutory provisions which wisely avoid this problem) Australian courts will allow the defence of insanity to succeed if the accused believed his action to be right, thought the general morality of the community agreed with him, but knew it was against the law.

While the M'Naughten rules stand, their virtue lies in their flexibility. The most that can be said for them is that by the interposition of the common sense of the jury and later the technical skill of the doctors advising the Home Secretary they work

substantial justice. If we press them into too rigid and precise a form we remove their one value. *Codère's Case* started this process of crystallisation, *Windle's Case* threatens to take it much further and to limit greatly the discretion of the jury. It is submitted that the interpretation placed on this limb of the M'Naughten rules by Dixon J. in *R.* v. *Porter* and by Dixon C.J., Webb and Kitto JJ. in *Stapleton* v. *The Queen* is more accurate and valuable than the *Codère-Windle* "illegality" interpretation and will tend to work greater justice, preserving as it does the power of the jury in an area where lawyers have shown themselves ill at ease.

Whether the test be phrased as the accused's ability to reach "a calm judgment in the character of the act" (in Stephen's terms) or "to think rationally of the reasons which to ordinary people make that act right or wrong—to reason about the matter with a moderate degree of sense and composure" (in the terms used by Dixon J.), it is submitted that such formulations are clearly preferable in law and practice to focusing the inquiry on the accused's knowledge of the illegality of his act. The "illegality" test can serve only to withdraw issues from the jury which should be left to them, or yet further to strain the consciences of counsel setting up the defence of insanity.

Concluding his analysis of the M'Naughten rules, Stephen (*ibid.*, p. 185) wrote: "The importance of the whole discussion as to the precise terms in which the legal doctrine on this subject are to be stated may easily be exaggerated so long as the law is administered by juries. . . . The impression made on my mind . . . is that they care very little for generalities. In my experience they are usually reluctant to convict if they look upon the act itself as upon the whole a mad one, and to acquit if they think it was an ordinary crime." This, surely, is what we want of the M'Naughten rules —it cannot be argued that in them we are seeking psychological precision. It is undesirable, therefore, to prejudge the issue at a stage before the jury may pass upon it.

It is submitted that the jury would have been a more appropriate body to decide whether Windle should or should not have been denied the defence of insanity than was Mr. Justice Devlin limited, as he felt himself to be, by a narrow and technically insecure interpretation of the M'Naughten rules.

If anyone challenges this analysis of one word as remote and unreal, let him blame our atavistic attachment to capital punishment which has precluded any satisfactory solution of the medico-legal problem of the defence of insanity. In the environment of capital punishment the formulation of this defence is most complex; in its absence it is quite easy.

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WANT OF CONSIDERATION

THE distinguished lawyers who signed the Law Revision Committee's famous Sixth Interim Report would doubtless have felt surprise at any suggestion that their recommendations as to the doctrine of consideration would come into effect "without recourse to legislation at all." Indeed, that part of the report which deals with consideration begins: "No doctrine of the common law of England is more firmly established at the present day than the doctrine of consideration." Lord Wright, the chairman of the committee, elsewhere stated the law in even more emphatic terms,[1] and more recently Denning L.J. has said that the doctrine is "too firmly fixed to be overthrown by a side-wind."[2] However, the last-mentioned learned judge has in a recent article[3] blown very hard upon consideration and has suggested that the law is developing in such a way as to lead to fundamental changes in the rule. The argument is supported by an examination of some recent decisions which in the learned author's view have "much modified" the old law. In the present article it is proposed to analyse Denning L.J.'s argument and to submit with all respect, that the doctrine of consideration has not changed one whit in recent years, and that what Lord Mansfield was too late to achieve in the eighteenth century cannot be achieved in the twentieth century otherwise than by legislation. It is not here proposed to re-argue the merits of the doctrine, although its usefulness as a negative test of the existence of a contractual obligation is familiar to all practising lawyers. The points for and against it are well known[4] and only extreme conservatives would not concede that it is at least in need of amendment. What is so disturbing to the ordinary lawyer, bred in the doctrine of the authority of precedent, is the suggestion that it is still open to the courts to emasculate if not destroy a firmly rooted principle of the common law. If this suggestion achieves the results aimed at, a much criticised doctrine will have been reformed at the cost of incalculable damage to a far more important principle, that of *stare decisis*.

In the article now under discussion Denning L.J. is concerned only with the unilateral contract—a promise for an act—and he contends that it is the present tendency to regard any act

[1] "The necessity of consideration is established by authorities which not even the House of Lords could distinguish or disregard," 49 Harv.L.R. at p. 1226.

[2] In *Combe* v. *Combe* [1951] 2 K.B. 215, at p. 220.

[3] "Recent developments in the doctrine of consideration" by Denning L.J.; 15 M.L.R. 1.

[4] See, *e.g.*, "The Reform of Consideration" by C. J. Hamson, 54 L.Q.R. 233; Lord Wright, *loc. cit.*; 1 M.L.R. 97; L. R. Committee, Sixth Interim Report.

done on the faith of a promise as sufficient consideration to support it and to bring a unilateral contract into being. It is respectfully submitted that this tendency does not in fact exist, and that if it did it would do violence to the true nature of contracts and should be discountenanced. First principles tell us that the following are necessary for the creation of a unilateral contract:—

(*a*) An offer. (This must contain (expressly or by implication) all the terms which are to be embodied in the complete contract, and can be reduced to the formula "if you perform act A, I promise to perform act B.")

(*b*) The communication of the offer to the offeree. (Without this communication the offeree cannot claim that, because he has unwittingly performed act B, he is entitled to call for the performance of act A.[5])

(*c*) The doing by the offeree of the act called for by the offer. (This constitutes acceptance of the offer, and also consideration on the part of the offeree.)

The controversy arises over requirement (*a*). Denning L.J. appears to deny the need for any reference (whether express or implied) in the offer to the part to be played by the offeree: it is sufficient that a promise is made which is intended to be legally binding and to be acted upon, and which is in fact acted upon.

Dr. A. L. Goodhart has cited[6] as "the stock illustration of a unilateral contract" that given by Brett J. in *Great Northern Railway* v. *Witham*[7] of A saying to B: "If you will go to York, I will give you £100," an offer which would be accepted by B's going to York. Denning L.J. would hold that if A merely says to B "I will give you £100" intending to create legal relations and intending B to act thereon, and B thereupon goes to York and runs up a hotel bill which he expects to pay out of A's £100, B's act provides consideration and renders A's promise binding. This might be satisfying to the moralist, but most common lawyers would unhesitatingly say that B's action for £100 damages against A should fail for want of consideration. It is perhaps more accurate to say that the offer contained no reference to the furnishing of consideration by the offeree and that therefore, since the terms of the offer must foreshadow the terms of the contract, the offer was defective and incapable of ripening into a contract. This was precisely the situation in *Combe* v. *Combe*,[8] where, shortly after a woman had obtained a decree *nisi* of divorce, her solicitors wrote to the husband's solicitors: "We understand that your client is prepared to make her (the wife) an allowance of one hundred

[5] *Wigan* v. *English & Scottish Life Assurance Association* [1909] 1 Ch. 291; *Oliver* v. *Davis* [1949] 2 K.B. 727; *Fitch* v. *Snedaker*, 38 N.Y. 248.
[6] 67 L.Q.R. 456.
[7] (1873) L.R. 9 C.P. 16.
[8] [1951] 2 K.B. 215.

pounds a year." The reply was: "The (husband) has agreed to allow your client one hundred pounds a year." No discussion had taken place on the question of the wife's forbearing from applying to the court for permanent maintenance, and there was no evidence on which to add any implied terms to the husband's "offer." [9] It could not therefore be turned into a contract by any act of acceptance by the wife and the Court of Appeal rightly found for the husband. Dr. Goodhart's suggestion [10] that "the price for the husband's promise was the wife's forbearance" and that his position was that he would pay her one hundred pounds a year until she made an application to the court, seems, with respect, not to be based on any evidence which was before the court and which was relevant to establishing the terms of the husband's offer. Dr. Goodhart emphasises that the negotiations were continued not casually, but by solicitors, and yet the correspondence apparently contained no hint of the "implied price" that the wife was to pay. The husband may well have intended the wife to act on his promise in the way she did: the crucial point was that he made no express or implied stipulation to this effect.

In case it should be said that Denning L.J.'s argument is based on the proposition that unilateral contracts are not governed by the doctrine of offer and acceptance, it is necessary to point out that the learned judge does not advance this as his view, and the cases he relies on are all consistent with analysis into offer and acceptance or, in other words, are concerned with conditional promises. Most reliance is placed by Denning L.J. on the cases concerning debtors who, to obtain forbearance from their creditors, have promised to give additional security. It is submitted that in these cases the debtor's offer could always have been reduced to the form shown in (*a*) above, although very often the act to be done by the offeree in return for the promise was not expressly mentioned but was to be gleaned from surrounding circumstances. Thus in *Alliance Bank* v. *Broom*,[11] the debtor had been asked for security, and must have known that, in the words of the learned Vice-Chancellor, if he "had refused to give any security at all, the consequence certainly would have been that the creditor would have demanded payment of the debt, and have taken steps to enforce it." It was easily deduced that, in return for his promise, the debtor was asking that such steps should not be taken.

Difficulty has been caused by the use of the word "request" in this connection. An unconvincing attempt has recently been made [12] to show that all offers must import a request to the

[9] "I cannot find any evidence of any intention by the husband that the wife should forbear from applying to the court for maintenance," *per* Denning L.J. Birkett L.J. made a similar observation.

[10] 69 L.Q.R. 109.

[11] (1864) 2 Dr. & Sm. 289.

[12] "Unilateral Contracts and Consideration," by Mr. J. C. Smith, 69 L.Q.R. 99.

offeree to accept them, but it is respectfully submitted that Dr. Goodhart is right in saying that this element is irrelevant. There is no case which has decided that, although all the terms of an offer were expressed, no contract in fact materialised because the offeror had adopted a take-it-or-leave-it rather than a precatory attitude, and no one expects such a case to arise in the future. Where the nature of the act called for has to be gathered from surrounding circumstances, however, it can often be inferred that the offeror has "requested" a particular act in return for his promise. Accordingly, judges have naturally made use of the word as, it is submitted, a convenient way of describing a stipulation impliedly contained in the offer. It may further be observed that in most of the cases where the word has been used the offeror, being a debtor *in extremis*, was supplicatory, and it was therefore more apt to say of him that he made a request, rather than that he imposed a stipulation.

Denning L.J. puts forward the view that: "Instead of using the old language of 'request' and 'consideration' we can express the self-same principle by saying that a promise is binding in law if it was intended to create legal relations, intended to be acted upon and was in fact acted upon." If this restatement connotes no alteration of existing principle it is beyond criticism; in so far as it introduces novel principles it is submitted with all respect that it runs counter to invincible authority, places the emphasis wrongly and is too wide. For example, if a right-minded debtor says to his creditor: "I consider that you are entitled to security and I undertake to give it, but I am not stipulating for any forbearance from you," and if the creditor relies on this statement and forbears, on Denning L.J.'s principle the debtor should be bound, though on the authorities he would not be.[13] The debtor might intend his statement to be legally binding but this would make no difference; indeed to consider this point is to beg the question, for however earnestly a man seeks to bind himself contractually he will fail if he neglects the essential legal requirements.

Denning L.J.'s object in this part of his article would appear to be to give a more general application to the principle enunciated by him in *Central London Property Trust* v. *High Trees House*.[14] In that case the learned judge said that "a promise intended to be binding, intended to be acted on and in fact acted on, is binding. . . . The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but

[13] *Cf.* Dr. Goodhart's example (67 L.Q.R. 456) of a father saying to his son "I do not ask you not to smoke until you are 25, because it is for you to decide this for yourself, but if you do not smoke before that time I will give you £100." This differs of course in that here the promise is conditional, forming an offer to enter into a unilateral contract.

[14] [1947] K.B. 130.

they have refused to allow the party making it to act inconsistently with it." Now it seems that a cause of action *is* to be given on the scant authority of a restatement of the rule in *Alliance Bank* v. *Broom*.[15] In this connection Denning L.J. treats *Combe* v. *Combe* as an exception to his suggested principle on the ground that the maintenance agreement there was not an implied request to forbear from application to the court. This was of course the *ratio decidendi* on the point of consideration or no consideration: it was not the reason why the *High Trees* doctrine was not applied. Byrne J. at first instance could understandably find no reason why the formula of *High Trees* was not satisfied, since it appeared to him that the maintenance agreement was intended to be binding and to be acted on, and was acted on in that the wife did in fact forbear from applying to the court even though not in pursuance of any request, express or implied, by the husband. Byrne J. was held to be wrong not in this, but in supposing that the *High Trees* shield could be beaten into a sword.

Denning L.J. finds another modern development in "the gradual disregard of 'benefit' and 'detriment.'" It is strange that no authority illustrative of this modern development can be cited later in date than 1866. In the "marriage cases" (*Shadwell* v. *Shadwell*[16] and *Chichester* v. *Cobb*[17]) it was held that marriage may involve a detriment in that pecuniary liabilities are undertaken, while in the third case relied on by Denning L.J., namely *Scotson* v. *Pegg*,[18] it was regarded as a benefit for a man to obtain "an interest in the performance of a contract made by another." All three cases were decided by judges who clearly regarded themselves as bound to weigh the question whether or not consideration existed by reference to criteria of benefit and detriment. To use these cases as the foundation for a directly opposite theory nearly a hundred years later and without citing in support any more recent authority seems, with respect, a curious way of establishing a conclusion.[19]

Turning to the rules governing the modification and discharge of contracts, Denning L.J. accepts that "the law for centuries has been that a promise to waive, modify or discharge the strict terms of a contract needs to be supported by consideration just the same as any other promise." He further concedes that

[15] (1864) 2 Dr. & Sm. 289.
[16] (1860) 9 C.B.(N.S.) 159.
[17] (1866) 14 L.T. 433.
[18] (1861) 6 H. & N. 295.
[19] Much difficulty is avoided if the complex idea of consideration is defined not by an over-concise reference to benefit and detriment but in terms such as those used in *Currie* v. *Misa*, L.R. 10 Ex. 162, and by Bowen L.J. in *Miles* v. *New Zealand Alford Estate Co.*, L.R. 32 Ch.D. 266, 289. In this way Denning L.J.'s example of the promise to a charitable institution (15 M.L.R. 2) can be met by saying that the promisor would be bound because, in procuring nine other persons to pay £100 each, the institution had incurred a responsibility to administer the funds so procured.

Foakes v. *Beer*[20] remains a binding authority in determining the "strict legal rights" of the parties. The claim is made, however, that the effectiveness of these principles has been undermined by the application of the equitable rule which is to be gathered from the judgments of Lord Cairns in *Hughes* v. *Metropolitan Railway*[21] and Bowen L.J. in *Birmingham, etc., Land Co.* v. *L. & N. W. Railway*.[22] This rule, under the rubric quasi-estoppel, has been subjected to an elaborate analysis by Mr. J. F. Wilson in a recent article,[23] and that learned author has demonstrated that the true statement of the rule is that where A leads B to believe that he intends not to enforce some contractual right which he has against B and B relies on that belief to his detriment, equity will restrain the exercise of A's contractual right until B has had an opportunity of recovering his former position, or if such recovery has become impossible a total restraint will be imposed. To express the rule in wider terms than this is to leave the authorities behind and venture into the realms of hypothetical jurisprudence. In any case it is clear that this rule of equitable or quasi-estoppel forms no part of the doctrine of consideration, although it may afford relief in cases where, through want of consideration, no contractual right exists. Denning L.J. however seeks to treat cases where one party to a contract has promised without consideration to waive, modify or discharge his strict legal rights and the other party has acted on such promise whether to his detriment or not as cases in which consideration exists. But, as indicated above, it is surely necessary to distinguish the unilateral contract with its clear break-down into offer (a conditional promise), and acceptance (an act fulfilling the stipulated condition), and the case of a simple promise which does not constitute an offer in the technical sense because it makes no reference, express or implied, to any future conduct of the promisee, but is unconditional and non-contractual, amounting to no more than a statement of intention binding in honour only except in so far as it may give rise to quasi-estoppel or delictual obligation. The fact that the promise is made in the context of a subsisting contract can make no difference because, as the learned Lord Justice concedes, consideration is required even in this case. But it is argued that consideration does exist wherever an act is done on the faith of such a promise, although there is binding authority directly contrary to this proposition. For example in *Foakes* v. *Beer*[24] itself there was an undoubted promise by the judgment creditor not to sue on the judgment if the debt were paid by agreed instalments. Undoubtedly this was meant to be

[20] 9 App.Cas. 605.
[21] 2 App.Cas. 439.
[22] 40 Ch.D. 268.
[23] 67 L.Q.R. 330. This apparently has the approval of Denning L.J.: see 15 M.L.R. 8 (footnote).
[24] (1884) 9 App.Cas. 605.

binding and to be acted upon by the debtor. It was acted upon in that the debtor paid every instalment, yet the House of Lords held that there was no consideration for the agreement so that it was void. It may be argued that Denning L.J. does not intend his new theory of consideration to apply to cases coming within the rule in *Pinnel's Case*,[25] although it appears to be put forward as a means of neutralising the effects of that rule. Can the new theory be applied apart from the rule in *Pinnel's Case*? Recent cases are relied on by Denning L.J. to show that it can, but there is clear authority to the opposite effect. In *Williams* v. *Stern*[26] A gave B a bill of sale on his goods as security for a loan to be repaid by weekly instalments. The bill authorised B to seize the goods at any time and hold them until the part of the loan then outstanding had been repaid. It also gave B a power of sale. A paid thirteen instalments punctually, but on the day when the fourteenth was due he had to attend the Court of Passage as a juryman. At A's request, B promised to wait a week for the instalment. Three days later, while A was still away on jury service, B seized the goods and sold them. The jury found that B had so acted as to induce A to believe that B would stay his hand, but judgment was given for B and a new trial ordered by a strong Court of Appeal on the grounds that there was no consideration for B's promise : it was, in the words of Brett L.J. " a mere naked promise," yet unquestionably A had acted upon it and B had intended that he should. Relief in equity was not granted, although *Hughes* v. *Metropolitan Railway* had been cited to the court.

The cases cited by Lord Justice Denning as authority for the proposition that any act done in reliance on a promise not to enforce contractual rights will now operate as consideration are the *High Trees Case*, *Foster* v. *Robinson*[27] and *Wallis* v. *Semark*.[28] The first of these contains celebrated *obiter dicta* all founded on the equitable principle of quasi-estoppel. It was never suggested in that case that the agreement to vary the rent constituted a contract, and indeed if it had there would have been no need to rely on quasi-estoppel at all, and the observation of the learned judge that " the courts have not gone so far as to give a cause of action in damages for the breach of such a promise " would have been inapposite. With all respect, therefore, it seems clear that the first case cited in support of the proposition that an act pursuant to a promise intended to be binding and to be acted on will create a contractual obligation is in fact an authority of contrary effect.[29]

[25] (1602) 5 Co.Rep. 117.
[26] (1880) 5 Q.B.D. 409..
[27] [1951] 1 K.B. 149.
[28] [1951] 2 T.L.R. 222.
[29] See the observation of Denning L.J. in *Combe* v. *Combe* [1951] 2 K.B. 215, that the *High Trees* principle " can never do away with the necessity of consideration when that is an essential part of the cause of action."

The second case relied on, *Foster* v. *Robinson*, was an appeal from a county court which turned entirely on a question of whether or not a tenancy had been surrendered by operation of law. The brief facts were that T had been tenant for many years of a cottage owned by L, the farmer who employed him. In 1946 a transaction took place between T and L of which the only evidence was that given by L (which was accepted as honest) at the hearing. L then said "I told him (*i.e.*, T) the existing tenancy would cease and I would charge him no more rent and he could live there the rest of his life rent-free. He said 'Thank you very much,' and said he was very pleased to accept the condition." From that time until his death in 1950 T lived under this arrangement, paying no rent. The Court of Appeal held that by the ordinary principles of estoppel T's daughter and administratrix was precluded from asserting that the tenancy had not come to an end in 1946 by T's conduct in living on in the cottage rent-free. Evershed M.R. remarked: "The fact that the doctrine of estoppel really forms the foundation in such a case as this of the alleged surrender by operation of law is, I think, clear from the judgment of Chitty J. in *Wallis* v. *Hands*.[30]" Singleton L.J. said "The position of the defendant's father was altered by agreement between the parties; there was a complete change: the father became a licensee, and could not have been heard to say that he was anything more than that. He had had the advantage of the agreement and had paid no rent for three and a half years."

It would not appear that this case is at all relevant to the doctrine of consideration, for it was not suggested that the arrangement of 1946 had created a new contract between L and T, unless certain observations of the Master of the Rolls are taken to have this meaning. Referring to L's promise to T that he could "live there the rest of his life rent-free," the Master of the Rolls said:— "Since the recent decision in *Winter Garden Theatre (London) Limited* v. *Millennium Productions, Ltd.*[31] I think that, although a licence of that kind may, apart from the terms of the contract, be revoked, it may now be taken that if the landlord, having made that arrangement, sought to revoke it, he would be restrained by the court from doing so."

With all respect, it is submitted that this observation is open to a number of criticisms. First, it is not requisite to a surrender by operation of law that some binding relationship supersede the surrendered tenancy,[31a] so that the question whether T's tenancy came to an end in 1946 or not is not affected by the question whether he remained in possession under a bare licence or under a

[30] (1893) 2 Ch. 75.
[31] [1948] A.C. 173.
[31a] See *Peter* v. *Kendal*, 6 B. & C. 703; *Metcalfe* v. *Boyce* [1927] 1 K.B. 758; Foa (7th ed.), 617 (cited with approval by Evershed M.R. in *Foster* v. *Robinson* at p. 155).

contract. Second, there is no suggestion in the county court judge's notes or in the report of counsel's speeches that there was in fact a new contract, and the learned judges in the Court of Appeal do not, apart from the passage quoted above, base their judgments in any way on a new contract or probe the question of consideration. Thirdly, the court were concerned at a possible evasion of the Rent Acts, and were at pains to emphasise that T had not been overreached. It may be that the question whether T's licence was irrevocable or not was relevant to the question of the genuineness of the 1946 arrangement, but it is submitted that in fact that arrangement gave T no more than a bare licence, and that such a licence was, in accordance with the immemorial doctrine of the common law, revocable at the will of the licensor. In any case it would seem that this point forms no part of the *ratio decidendi* of the case, which, as stated above, was based on the ordinary principles of estoppel.[32]

The third case relied on by Denning L.J. is *Wallis* v. *Semark*, which concerned the alteration of words in a rent-book from "one month's notice each party" to "one month's notice from tenant; two years' notice from landlord." Somervell L.J. rejected the argument that there was no consideration for the change in the terms of the tenancy in these words: "I think that fails. Though very little is known, I think that it would be wrong to draw that inference from the fact that one month was changed to two years. We do not know the circumstances. In cases of this kind it is always possible that a tenant may say: 'unless you can give me greater security, I must go.' And if he is a good tenant the landlord, *for a good consideration*,[33] may say: 'I will give you greater security,' and the consideration is the tenant's remaining on and paying the rent." It is submitted that the learned Lord Justice was here finding a unilateral contract under which, in consequence of the landlord's promise, the tenant refrained from terminating his tenancy and thus satisfied the condition on which the promise was given. Although the decision may be open to the criticism that the altered terms were repugnant to a monthly tenancy and were therefore void, it is submitted that on the point of consideration Somervell L.J. must be taken to have held that there were facts from which consideration could be inferred, whilst in the other judgment Denning L.J. expressed the view that "there was no consideration in point of law" but held the landlord estopped from disputing the varied terms by virtue of the *High Trees* principle. Again, it is difficult to see how this case can be said to furnish any authority for modifying the doctrine of consideration.

[32] See the explanation given by the Master of the Rolls of his above-cited dictum in *Vaughan* v. *Vaughan* [1953] 1 All E.R. 209, 211.

[33] Italics mine.

In Part V of his article, entitled "Cases on Conduct," Denning L.J. discusses the quasi-estoppel cases, starting with *Hughes* v. *Metropolitan Railway*, but it appears from the observations in the concluding part of the article that the learned author prefers to regard these cases as exemplifying not aspects of the doctrine of consideration but "a kind of estoppel," a view which appears to agree with most contemporary opinions on this topic.

In the result, it is submitted with respect that the authorities relied on by Denning L.J. do not manifest any change in the doctrine of consideration, or even, apart from the quasi-estoppel principle of *Hughes* v. *Metropolitan Railway*, provide any relief against its effects. The common law cannot at its present stage of development change its well-established rules without the aid of the legislature, and if the question now under discussion came before the House of Lords for decision it is submitted that there can be little doubt of what their Lordships' answer would be. *Mutatis mutandis*, the words of the present Lord Chancellor in the *British Movietonews Case* [34] might well be echoed: "Nor can I accept the theory . . . that in recent cases . . . there has been some development of this branch of the law.[35] . . . It is, no doubt, essential to the life of the common law that its principles should be adapted to meet fresh circumstances and needs. But I respectfully demur to the suggestion that there has recently been, or need be, any change in . . . the application of the law of frustration to commercial agreements, and, if indeed (certain recent cases) illustrate such a change, they would have to be regarded as of doubtful authority; they can, however, be justified on more orthodox grounds."

In conclusion it is desired to draw attention to the dangers implicit in any weakening of the importance of the contractual tie and any attempt to provide contractual remedies where no contract exists. The attempt to do justice will bring widespread uncertainty into the law, so that a growing number of litigants and even their skilled advisers will be unable short of litigation to determine what their rights and liabilities are. Consideration still remains part of our law because, as Anson wrote long ago: "We need some means of ascertaining whether the maker and receiver of a promise contemplated the creation of a legal liability." [36] This touchstone is not infallible, as shown by such cases as *Balfour* v. *Balfour*,[37] but without it disputes as to whether an agreement was intended to be legally binding or not could rarely be resolved without litigation. Uncertainty, especially in commercial matters, should always be the law's enemy and the maxim "hard cases make bad law" may have to be borne firmly in mind. In two recent cases this maxim was apparently overlooked, with strange and inelegant results.

[34] [1952] A.C. 166, at p. 188.
[35] *i.e.*, the doctrine of frustration.
[36] *Law of Contract*, 14th ed., p. 98.
[37] [1919] 2 K.B. 571.

The first case was *Brown* v. *Sheen and Richmond Car Sales Ltd.*,[38] where A, a motor dealer, made certain representations to B regarding a particular car. Acting on these representations, B paid a deposit to A, and entered into a hire-purchase agreement with C whereby C bought the car from A and re-sold it on hire-purchase terms to B. B now sought to sue A on the representations. Jones J. made no finding of fraud against A, but held that B was entitled to recover for breach of warranty notwithstanding there was no sale and therefore no contract as between A and B. This decision was followed by McNair J. in *Shanklin Pier, Ltd.* v. *Detel Products, Ltd.*,[39] where X, a firm of paint manufacturers, represented to Y, the owner of a pier, that their paint had various qualities which made it suitable for painting a pier. Acting on this, Y specified in his contract with Z, who was to paint the pier, that X's paint be used. It was so used, and proved unsatisfactory. Y sued X for breach of warranty. The learned judge held that there was an enforceable warranty supported by the consideration that Y should cause Z to enter into a contract with X for the supply of the paint. This apparently did not amount to a finding that there was a contract between X and Y, since *Brown's Case* was relied on, and the plea that the warranty in question was not actionable since it was not a term in any contract between X and Y was rejected on the grounds that such a contract was unnecessary. McNair J. remarked that "If, as is elementary, the consideration for the warranty in the usual case is the entering into of the main contract in relation to which the warranty is given, I see no reason why there may not be an enforceable warranty between A and B supported by the consideration that B should cause C to enter into a contract with A . . ." With all respect, it is submitted that there is some confusion here between a mere representation, which may induce a party to enter into a contract, and a warranty, which can only have legal effect if it constitutes one of the terms of the contract or forms an additional contract on its own. It is well established that a mere representation which turns out to be untrue gives no right to a claim for damages unless there is a finding of fraud.[40] It is equally well established that a warranty can, at any rate where no fraud is alleged, only give rise to liability in damages where it forms a term in a contract.[41] The learned judge in the

[38] [1950] 1 All E.R. 1102.

[39] [1951] 2 K.B. 854.

[40] See, *e.g.*, *Heilbut* v. *Buckleton* [1913] A.C. 30: "It is, my Lords, of the greatest importance, in my opinion, that this House should maintain in its full integrity the principle that a person is not liable in damages for an innocent misrepresentation, no matter in what way or under what form the attack is made," *per* Lord Moulton at p. 51.

[41] See, *e.g.*, *Mahon* v. *Ainscough* [1952] 1 All E.R. 337: "There seems to be no hint in the evidence of there having been any intention to make such a separate contract as a warranty must necessarily import," *per* Evershed M.R. at p. 340. See also Jenkins L.J. at pp. 340–41, *passim*. In the *Shanklin Pier Case* the following dictum of Scott L.J.'s in the similar case of *Drury* v. *Victor Buckland*,

Shanklin Pier Case, in the dictum cited above is, with respect, enunciating an undoubted principle if he is taken to postulate as an "enforceable warranty" an agreement between A and B that A should be liable in damages if certain representations he has made prove untrue, in consideration for B's causing C to enter into a contract with A. This would be enforceable as an ordinary unilateral contract. However it seems apparent that this was not the postulate intended; indeed the learned judge described the point arising in the case as posing a "comparatively novel question." Thus it appears that in order to relieve a deserving defendant from hardship the court was in both the cases cited granting a contractual remedy to one not privy to any contract, or, it might be said, awarding damages for fraud where no fraud existed. The law is quick to grant its aid where there has been wrongdoing, but it has always hitherto insisted that a non-fraudulent party shall have bound himself contractually before being mulcted in damages for some other's loss.

"To administer justice it is necessary to administer law" and it may be said with all respect that those who, from motives of compassion, show a want of consideration for principles of high and long-standing authority—either by choosing to ignore them or by formulating unreal distinctions—do only disservice to the true cause of justice. To usurp the function of the legislature in the name of a developing jurisprudence is surely to destroy the reality of the common law, to make its doctrines undependable and to leave those whom it should serve bereft in costly uncertainty.

Francis Bennion.*

Ltd. [1941] 1 All E.R. 269, was cited: "It was a sale by the Buckland Company (the defendants) to the hire-purchase company. The property passed to them on the terms that they (the defendants) would get paid by the hire-purchase company. Therefore. the claim (brought by the plaintiffs) against them (the defendants) for damages for breach of warranty is a cause of action unsupported by any contract which would carry it." This was distinguished by McNair J. on the grounds that it applied only to the case where the warranty was one implied by law (as under the Sale of Goods Act, 1893) and not where the warranty was express. It is respectfully submitted that this distinction is invalid, and that Scott L.J. intended to refer to the necessity for a warranty to be embedded in a contract in order to be actionable.

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COLLECTIVE BARGAINING AND GOVERNMENT WAGE REGULATION IN THE NETHERLANDS *

I. *Historical Introduction*

1. Before the Second World War wage-fixing in Holland was a matter of free bargaining between employers and workers. Broadly speaking, the wage level was determined by historical growth and by the bargaining strength of the parties. About a quarter of the workers were protected by collective agreements, which in Holland are contracts, binding and enforceable at law. But the wage levels fixed by collective bargaining influenced the labour relations of many non-organised employers and workers who were not legally bound by any collective agreement. An Act of 1937 opened up the possibility of issuing ministerial decrees extending the terms of collective agreements to employers and workers in the trade or industry who were not bound as a result of voluntary membership in the contracting organisations. Until the war this statute was only applied in a few cases. Apart from this Act, government influence on wages was confined to civil servants and other public employees, to public work contracts and to certain measures concerning agricultural wages. But on the whole the system of wage-fixing remained a free system and the outcome of negotiations was more or less haphazard.

About two-fifths of the workers were members of trade unions. The mutual relations between the workers' organisations and those of the employers were steadily improving. Though in some trades bitter feuds still occurred, good and stable relations had grown up in many others. At the top levels the organisations had many contacts. These were mostly *ad hoc*, but more or less regular joint consultations had developed on social matters of a general nature, especially in the field of social insurance.

By virtue of an Act of 1923 a government agency was formed for the prevention and settlement of trade disputes, and four Conciliators were appointed for this purpose. They were not civil servants, but acted on a part-time basis and mainly in a voluntary capacity. They had no compulsory but only persuasive powers, *i.e.*, the power to mediate and conciliate, and the success of their work depended on sound common sense and personal prestige. Strikes and lock-outs in Holland were reduced to moderate dimensions, both in numbers and in extent.

* A Special University of London Lecture in Laws delivered at the London School of Economics and Political Science on February 26, 1953.

2. When the German occupation of the Netherlands began in May, 1940, the enemy introduced an absolute price-stop and wage-stop; everything was rigidly frozen; and strikes were prohibited under threat of heavy penalties. Of course very soon exceptions to the wage-stop had to be granted. It would have been logical to form a special wage-board for administering these exceptions; but this might have meant that the Germans would have put in some of their puppets. The power to grant exemptions from the wage-stop and subsequently the entire task of fixing and controlling wages was therefore entrusted to the only officials who had in the past been able to gain extensive and intimate experience in these matters and who at the same time enjoyed the confidence of employers and workers, *viz.*, the Government Conciliators assembled as a board. This system worked fairly satisfactorily—insofar as anything was able to work satisfactorily during the occupation. But it did not last long. After two years the Germans replaced it by a scheme entirely modelled on the pattern of Nazi legislation, and managed by one of their creatures. This system was merely a façade with nothing behind it, and it is valueless to dwell upon this phase of the development now.

The Germans also tried to remodel the trade unions according to their aims; this led to a veritable exodus of officers as well as of the rank and file. After some time the oppressors put one of the quislings, to whom they had already entrusted part of the trade unions, in charge of the whole combined trade union movement. But the employers refused to recognise him as a real representative of the Dutch workpeople. Because of this loyalty of the employers to the democracy of the workers' organisations—a thing quite incomprehensible to the Germans—the employers' organisations were disbanded. These events had far-reaching consequences. The leaders of both sides, employers and labour, joined forces to resist the common enemy whose brutality in harnessing Dutch economic life to German war purposes grew every day. Frequent secret meetings and consultations fostered a spirit of mutual understanding. Very soon these went beyond a discussion of day to day events, and extended to the preparation for close collaboration during the extremely difficult times to be expected after the liberation about which, knowing our allies, we never had any doubt.

3. As a result of these developments, immediately after V.E. Day all the important central organisations of employers in industry, trade and agriculture, together with the central trade union organisations, created a permanent institution for co-operation. This was called the Foundation of Labour and it merits the fame it has, within a very short time, acquired at home as well as far outside our boundaries. The aim of this body is "to ensure good permanent social relations in Dutch industrial life on a basis of joint co-operation between employers and workers." To translate this into British terms: it was as if a permanent joint body for

close co-operation had been formed by the British Employers' Confederation and the Trades Union Congress, a kind of supreme Whitley Council for the whole nation.

The Foundation of Labour, embracing all organisations of importance on both sides with the exception of the small communist United Trade Union Centre, almost immediately became the advisory body for the Government in respect of all important measures in the field of social policy. A tripartite relationship originated of which I shall have more to say later on in this lecture when dealing with its importance for the fixing of wages. In the meantime the Foundation of Labour was only intended to be a first private step on the road to a more elaborate public organisation of industry. The Industrial Organisation Act, 1950, created the framework for this organisation, which, however, is only in its infancy and which at present I must leave aside. I want to mention, however, that under the provisions of this Act, there has been created a tripartite Social Economic Council which has been given far-reaching duties and is the official advisory board on questions not only in the social but also in the economic field. The Foundation of Labour however has not been disbanded, though some of its functions have been taken over by the Social Economic Council. At present the Council is consulted on long-term trends of wage policy, while the day to day problems of wages remain the province of the Foundation.

4. Let us now return to 1944–45. The Dutch Government in exile, which enjoyed hospitality in London, had prepared several measures for the period to follow liberation. This Government shared with the leaders of the secret organisations of employers and workers in occupied Dutch territory the conviction that immediately after the liberation some form of governmental control of wages and prices would be an absolute necessity.

It should not be forgotten that at that time our country was suffering severely: it had been ransacked by the enemy, large parts of the industrial equipment were in ruins, nine-tenths of our traffic system was destroyed, we had passed through the " hunger winter " and were underfed, the labour market was disorganised, the organisations were disbanded, foodstuffs and commodities were scarce, only paper money and the national debt were abundant.

Under those conditions governmental wage- and price-control were a vital exigency.

Legislation for that purpose had already been put into force in that small part of the country which remained liberated after the heroic battle of Arnhem. After V.E. Day it was reconsidered and redrafted though not changed in principle. Thus came into being the Extraordinary Decree on Labour Relations, of October 5, 1945.

II. *Organisation*

5. As far as wages and other labour conditions were concerned the governmental powers of control were again assigned to the Board of

Government Conciliators. These powers are very extensive indeed.

"The Board may, either at the request of the employers' and workers' organisations or *ex officio*, establish binding rules for, and in relation to, wages and other conditions of employment." (Art. 12.)

"New collective agreements and modifications of existing collective agreements shall require approval by the Board." (Art. 14.)

"The powers vested in Our Minister under the Act respecting the declaration of provisions of collective agreements as generally binding or as not binding, and the duties imposed upon him by the said Act, shall be exercised and executed by the Board." (Art. 15.)

"The Board may, within the limits of the general directions issued by Our Minister, establish guiding rules to govern wages and other conditions of employment." (Art. 16.)

And moreover the Board has the power of authorising exceptions to or derogations from the rules mentioned before. (Art. 17.)

The wage stop (subject to exceptions), which was explicitly maintained in the London legislation, is not mentioned in the 1945 Decree. But the first measure of the Board was to lay down this wage stop in a "guiding rule."

The decisions of the Board have legal force. Any employer granting wages or other labour conditions differing from those prescribed or approved by the Board is punishable at law.

How is it possible that a system which looks so extremely dictatorial can work—and can work rather satisfactorily—in a country as thoroughly democratic as the Netherlands?

To answer that question several facts must be mentioned.

6. I must first point out that the name of the Board is rather deceptive. It is not a conciliating or mediating board but a wage-fixing and wage-controlling body. Neither in England nor in my country is it uncommon to find that the name of a body bears little relation to its function. The phenomenon usually finds its explanation in history. I have already mentioned the reasons why in the early period of the occupation the job of controlling wages was entrusted to the former Government Conciliators. These reasons provide the explanation why the name was kept.

But not only the name. For, notwithstanding the change in function the Board also carries on the traditions and the spirit of the former Conciliators. Its members are not civil servants doing a full-time job on the Board. They are independent men, who have their main job elsewhere and—except for the President of the Board—spend only part of their time on this work. They are carefully chosen from all shades of Dutch social-political thought—though inside the Board those differences hardly ever show. And they all—if I may say so though belonging to the Board myself—enjoyed already a certain personal authority in labour questions

before being appointed as members of this Board. And they are all imbued with the spirit of industrial democracy, which ensures that in all their actions they keep in touch with both industry and the workers. The intelligent young men who act as our secretaries are taught first of all that bureaucracy is nearly the worst of sins!

7. The members of the Board are not civil servants but independent men. Yet the Board is not a court of justice, applying rules of law, but an executive agency, taking decisions on wage policy. Wage policy forms part of the general social economic policy of the country; therefore the Board cannot be entirely independent. For the responsibility for government policy on wages must in a democratic country lie with the Cabinet, which in its turn is responsible to Parliament. So the decree says: "The Board shall in the exercise of its powers comply with the general directions of the Minister of Social Affairs." (Art. 11, 4.)

It should be noted that there is a considerable margin of independence. The Minister is responsible for the way in which the Board conducts its affairs in general; and the Board always keeps in mind that the Minister must be able to answer for its acts. But the Minister can only take responsibility for those acts in general; he must not be bothered with details of the decisions of the Board. In this respect the Board is a buffer for the Government.

8. There is another factor to temper any tendency of the Board to act in a dictatorial way. According to art. 19 of the Decree the Board must, before taking any decision concerning matters of more general importance, obtain the opinion of the Foundation of Labour.

Of course an opinion is only an opinion. Legally there is no obligation whatever for the Board to decide according to a recommendation of the Foundation. But a policy of wage-fixing by a governmental Board cannot in fact succeed in a democratic country like ours unless in a general way it is backed by organised employers and workers. There may be many differences in opinion as to details, even as to very important details. But the general trend of our wages policy in this post-war period has met with the approval of organised employers and organised labour.

More exactly: the wages policy is mainly a result of endless and perpetual negotiations with the organisations of employers and workers both in the separate industries and also with them as a totality knitted together in the Foundation of Labour. In very important matters negotiations are conducted between the Minister of Social Affairs or even the Cabinet and the Foundation. In other matters of a general character and in all important questions concerning a single branch of industry, the decisions are the result of discussions and negotiations between the Board and the Foundation of Labour. And in any matter relating to a specific industry the organisations concerned get ample opportunity of voicing their opinions and of defending their interests, in writing as well as in

hearings before the Board or the Foundation, separately or in common session.

9. It is interesting to observe that a certain dynamic equilibrium has been created which was not quite anticipated at the beginning but proved very useful. It works both ways.

(a) The rank and file of industry very naturally want to improve their own position. The leaders of the organisations in the different branches of industry, those of the employers as well as those of the workers, whilst accepting the principle of controlled wages for the benefit of the country as a whole, usually urge that within that framework their own industry should get additional advantages, more increases, more freedom than is normally given to them, though they themselves have already mitigated the more exorbitant demands of the rank and file. At this point the Foundation of Labour acts as a buffer between these specific demands and the necessities of a general policy and it usually succeeds up to a point in convincing them of the impossibility of fulfilling many of these particular demands. But the Foundation of Labour, though in many respects an organisation which is intended to further the common welfare of the Dutch people as a whole, is still a private organisation of the workers and the employers who are directly interested; and this organisation has to be kept together. Therefore the Governing Body of the Foundation is more apt to yield to any demands of the parties which have some justification than would a governmental board. Although the Foundation of Labour acts as a brake in many respects, it still defends *vis-à-vis* the Government the interests which it represents. The Foundation is sometimes inclined or forced to compromise in order to keep together the two sides which are constituent parts of its own body. The opinion of the Foundation of Labour carries very considerable weight with the Board of Conciliators. But this Board also has a responsibility of its own and may again put on the brake. In this way the final decisions are the results of deliberations taken step by step and by degrees, which—psychologically—increases the likelihood of their being readily accepted.

(b) The same applies the other way round. If the Board wants to start a given policy, it is first laid before the Foundation, which, by reason of its being in closer touch with the feelings of the organisations, may by its advice change or mitigate this policy. Besides, being an organisation of the organisations themselves, it is more apt to win for this policy the approval of the rank and file on both sides.

10. From the foregoing, it appears that the Board of Conciliators is not by any means as dictatorial a body as it seems to be if one only reads some sections of the Extraordinary Decree on Labour Relations. The Board itself wants as much as possible to avoid

imposing regulations against the wishes of the people directly concerned. It wants industry, jointly organised, itself to take responsibility wherever this is possible without endangering the general policy. Thus the Board has been quite a force in promoting collective bargaining and negotiation in sections of industry that were underdeveloped in this respect. It has also promoted joint committees to advise on the application of the regulations and on exemption therefrom. It tends to delegate decisions of minor importance to those joint committees wherever this seems appropriate. But of course it must keep general wage policy in its own hands.

III. *General Features of post-war wage policy*

11. Now, what have been the main features of this wages policy?

Immediately after the liberation general permission had been given for a wage increase of 25 per cent. above the 1940 level or 15 per cent. above the level of October 31, 1942 (which was the date when the activities of the war-time Board of Conciliators came to a close).

This measure—afterwards called the first " wage-round "—was a provisional step, inevitable at that moment because of the considerable rise in the cost of living. It was a very crude measure however, because it continued and indeed increased all the iniquities which were inherent in the pre-war wage structure and specially the unfavourable pre-war position of agricultural wages. Moreover, it soon became clear that this increase did not cover the rising costs of living.

12. Therefore the so-called second " wage-round " was started towards the end of 1945.

In this round new wages were laid down for the different branches of industry separately; partly through approved collective agreements but mostly through binding rules made for each important trade. Within a couple of months about 160 new regulations of wages and other conditions of employment were made on the basis of the powers conferred on the Board in section 12 of the Extraordinary Decree on Labour Relations. It should be noticed that these regulations were not created by the Board out of nothing by their own dictatorial fancy. The Board's actions always arose out of requests and proposals made by employers' or workers' organisations, very often joint proposals, in many cases based on pre-war collective agreements or war-time systems of wages, adapted to the current conditions. On these proposals the Foundation of Labour gave an opinion and before that they had been discussed by the Foundation and by the Board with the parties concerned. And out of these negotiations and consultations the rulings of the Board grew; they were not uniform but showed many differentiations between the various industries.

At the base of all these regulations however was a general scheme and were some guiding general principles, which had been

drawn up after thorough discussion between the Foundation of Labour and the Board of Conciliators.

The starting point was a calculation of the minimum amount required by a worker with a family of two children to buy the necessities of life, which at that time were available on the ration cards, and to pay fixed costs like rent, etc. Because of variations in the cost of living between different areas (mainly due to the differences in rent) all areas were classified in five groups —from the big towns to the purely rural areas. And five minima of hourly wages were set up accordingly.

In addition a distinction was made between unskilled, semi-skilled or trained, and skilled workers, with a differential of about 10 per cent. between each of these categories.

This general scheme for a wages floor and for a differential wages ceiling served as a guide for the many regulations in which the peculiarities of each branch of industry were also taken into account. We started with some big trades: building, agriculture, engineering; and this having been done, it proved less difficult to fit in the others than had been assumed previously.

13. After this second "wage-round" the Government was of opinion that a certain balance between wages and prices had been reached and that, considering the economic position of the country, a further rise of the basic wage rates was not justified. It was therefore announced in October, 1946, that the wages freeze would be more firmly applied. But the work of the Board and of the Foundation did not diminish. For there were to be two kinds of exceptions to the idea of an absolute wages stop. First of all changes were permitted in wages which in the light of mutual relations still needed adjustments. Moreover, increase in earnings could be allowed if they were coupled with higher productivity of labour and a decrease in costs of production; thus new wage systems which, without changing basic rates, would stimulate production could still be introduced and were even to be encouraged.

In the light of these two aims (the co-ordination of adjustments and the stimulation of production) the national or regional regulations and collective agreements for separate industries—of which there were about 200—became the object of constant small changes and revisions. Moreover, the Board has to deal with separate wage schemes for individual enterprises not belonging to an industry covered by a general regulation and for numerous individual enterprises with exceptions from the general rules of their industry; altogether about 6,000 "individual cases" per annum!

14. Unfortunately but naturally, the standstill more or less implied in the decision of October, 1946, could not remain for ever. The adjustment of wages proved to be a never-ending job, and the working out of systems to increase earnings as a result of increased productivity required great efforts; I shall have to speak about this in some detail later on. Moreover, several general increases of

wages have had to be granted. In each case these were the results of joint consultations and negotiations between the Government and the Foundation of Labour. And though they were legally based on an order of the Board of Conciliators their real foundation was a decision taken by the whole Cabinet. These general increases were as follows:

(a) In the autumn of 1948, Government subsidies to the prices of various foodstuffs were considerably reduced because of the needs of the exchequer as well as on account of agreements within the framework of the " Benelux " Treaty. By way of compensation a temporary flat increase of Fl. 1 a week was added to the wages of all employed persons with an income of less than Fl. 3,700 per annum.

(b) After the devaluation of the Guilder in September, 1949 (a sequel to the devaluation of the pound), a maximum wage increase of 5 per cent. as from January 1, 1950, was permitted by way of compensation for the rise in the cost of living, with the proviso that this wage increase should be counterbalanced by an extra effort to raise production so as to justify it from an economic point of view. This increase could be incorporated in the wage regulations and collective agreements, in which case the temporary allowance of Fl. 1 was incorporated at the same time. We called this the third round of wages increases.

(c) After January, 1950, however, the cost of living rose further than had been foreseen. Hence, in September, 1950, a new general increase of 5 per cent. was prescribed for all wages laid down in collective agreements or binding regulations of the Board of Conciliators, while for other wages a similar increase was not prescribed but allowed.

(d) In the meantime the general economic condition of the country remained critical. The outbreak of hostilities in Korea in June, 1950, the unrest in international political life and the beginnings of rearmament had repercussions on international economic life which gave rise to a very unfavourable trend in our terms of trade, our balance of payments and our internal budgetary situation. The Social Economic Council recommended, among other measures, a general reduction of consumption of about 5 per cent.; one of the means to achieve this to be a drastic cutting of remaining subsidies on essential commodities. The carefully computed increase in the costs of living which would result would amount to about 10 per cent. By order of the Board of Conciliators of March 22, 1951, a wage increase of 5 per cent. was introduced within the framework of a number of economic measures.

This " wage-round " is, I think, of particular interest as an illustration of how our system is able to work. For though nominally wages were increased by 5 per cent., real wages all over the country were lowered by 5 per cent. I do not believe this measure, to which the trade union movement consented and which was put

through at once all over the country, would have been possible if we had not developed the spirit of tripartite collaboration after the war and if we had not had at our disposal the legal tools furnished by the Extraordinary Decree on Labour Relations.

(e) The last round of wages hitherto (we have ceased to count them !) took place on July 1, 1952. Then our new Unemployment Act became operative and an increase of nominal wages was prescribed, equal to the amount of the contribution which each wage-earner has to pay for this compulsory insurance.

IV. *Special features*

15. After this sketch of the general development of Dutch wages policy let us turn to some principles and practices as shown in the work of the Board of Conciliators and of the Foundation of Labour. I must, of course, make a selection.

When wages are left free, big differences may arise and persist owing to differences in the economic conditions of separate branches of industry (and even of individual enterprises) and quite apart from the significance and value of the work done—*e.g.*, in the thirties the skilled engineers in shipbuilding were often earning less than unskilled labourers in breweries; and agricultural wages were horribly low.

As soon as a control of wages is introduced all wages tend to become interdependent. It is impossible for a government agency to fix a certain social minimum in one trade and to approve of quite a different social minimum in another trade. And it is also felt to be unjust if a standard wage in one industry is higher or lower than the standard wage for the same work done in another industry. In controlling wages a government body must co-ordinate them according to job-content and irrespective of the profits in any special industry or enterprise, in order to promote justice and stability on the labour market. Experience has taught us that sensitivity in this respect is very much greater under a system of controlled wages than under a free wage system. One penny more or less in a certain case has far-reaching consequences elsewhere. As it was said once: "If in one enterprise a window is opened a crack, enterprises in quite another industry and quite another part of the country begin to sneeze." If the Board approves a wages differential, it must justify it. And the Board must be able to give reasonable motives which can be explained and made clear to others.

Now the accidents of tradition, the results of demand and supply on the labour market in the past and factors of this kind are data that cannot be immediately left out of account in real life. It is not easy to induce people to give up advantages resulting from such factors. But it is no easier to convince other people that for such reasons only they should earn less than others.

Of course there are reasons for differentiations, which are recognised and desirable and which play a large role in regulated wage-fixing. Of these a few must be discussed.

16. First of all I should like to refer once more to the differences in money wages between the five classes of municipalities or districts, according to their more or less urban (or less or more rural) character. When accepting a system of five classes in 1945–46 the Board of Conciliators reduced the pre-war differences in many trades in order to give the social minimum even to the lowest-paid groups in the rural areas without too great an increase in total wages and production costs. There is still much controversy on this subject and there is a strong tendency to abolish the classification altogether. As long as it stands, however, a certain uniformity must be imposed; for it is impossible to let every trade have its own way in this respect without danger to the entire wage-structure.

17. Another reason for establishing differentials in standard wages must of course be found in the kind of work done. I have already said that we started with a margin of about 10 per cent. between unskilled, semi-skilled and skilled workers respectively.

It soon became apparent that this traditional distinction in three categories is too crude a distinction and that the fixing of wages in three scales according to skill has an undesirable levelling tendency. What was wanted was a better and more refined method of distinguishing between the different grades of skill.

So modern scientific methods of job-analysis and work-classification were called to help. They had already been developed for the purpose of grading the workers within certain individual enterprises. But now their scope was extended and generalised. Not only were job-analysis and work-classification used to get a better differentiation in wages in whole branches of industry, but they are also being used—and this I think is a unique feature of our methods—to get a better comparison between different kinds of work in different industries.

Of course such new methods can only be introduced gradually. Much reluctance among employers and among the workers and their organisations had to be overcome, arising from ignorance or from fear of speeding-up and overstrain of which there had been experiences in the past. Much technical investigation was also necessary to adapt the existing methods. But the Board of Conciliators in collaboration with the Foundation of Labour succeeded in allaying distrust and suspicion. So a normalised system of work-classification has been developed which enables us to grade the various processes in a much more refined way than before and also to compare wages of different industries more exactly.

18. A third reason for laying down differences in earnings is connected with the quantity and the quality of individual and of group achievement. This leads us to the subject of piece rates and other systems of payment by results.

In order to increase production and productivity in our impoverished country the Board immediately favoured and sponsored the incentives which a good system of payment by results may offer. There were, however, two dangers to be avoided. Social justice could not allow arbitrary rate-cutting such as had sometimes been practiced in pre-war times. And the idea of wage control rules out the use of piece-rate systems as a means of increasing money wages without an increase of productivity (as was the tendency immediately after the war because of the shortage of many kinds of workers). Therefore piece-rate increases are kept within very narrow limits unless the rates have been scientifically fixed and have been based on exact time-studies, preferably under the auspices of the joint parties and controlled by the technicians of the Labour Inspectorate.

In those cases where payment by measured results cannot be applied stimulation of individual effort and reward for individual capacities and performances may be found in a scientific system of merit rating. Or even a small margin may be left to the employer to pay more than standard wages in individual cases according to his own subjective view. Piece-rate increases, however, have to be kept within narrow limits, for otherwise they tend to upset the whole system of control.

19. This brings me back to one of the main points of the system of controlled wages.

Before the war collective agreements specified minimum wages. No employer was allowed to pay less but he was always at liberty to pay more.

Today control of wages in our country is double-sided. Not only the minimum but also the maximum is under control. For clerical work usually a margin between minimum and maximum salaries is prescribed. For manual workers however wages are usually fixed as standard wages. It is not permitted to pay less but neither is it allowed to pay more.

Now it would be easy to circumvent this system and to entice workers away from other employers if only wages proper were under control but all other forms of remuneration were left free. Hence the system must make it possible to control every kind or form of remuneration; all kinds of allowances, emoluments or gratuities paid by the employer, payments by way of profit-sharing, holiday-pay, pension schemes and so on. The powers of the Board of Conciliators therefore are not confined to wages in the strict sense only, but the Board can deal and does deal with all kinds of wages or other conditions of employment.

V. *Results and Prospects*

20. I have explained the origin of the post-war system of settling wages in Holland and the way it functions. I have sketched the main steps in the actual development of wage policy and some

special features and daily problems. It is obvious that before concluding my remarks I must consider the results and must say something about the advantages and disadvantages of this system of wage settlement. For that purpose I may be allowed to mention the following facts :

(a) Under this system wages and prices have not played leap-frog, as they have in some other countries. Although an inflationary spiral was menacing us all the time, we were able to avoid it.

(b) Wages and prices were kept in hand. Wages have risen in accordance with a slowly rising curve of increasing real income, which corresponded with the possibilities of our post-war reconstruction and recovery. But when it was judged necessary there could also be introduced a general decrease.

(c) The wages policy has fostered social justice in many respects. It has at its root the conception of a fair deal for labour as a whole, of a just wages fund to be calculated as part of the national income. It has also promoted social justice between the wage earners. It has improved the relative position of backward groups. It has eliminated many differences which were unjustified and were only historical accidents. It aims at relating differences in real wages exclusively to differences in work done.

(d) This wages policy also aims at an increase in the productivity of labour as far as this can be fostered by a wages policy. It has done this by a systematic study and application of scientifically measured and socially controlled methods such as work-classification and the like. But closely linked therewith is the introduction of scientific methods into the internal organisation of the whole enterprise. It is a common experience that the very attempt to introduce a more scientific method of payment results in a more systematic organisation of the methods of work.

(e) Of course a system of wage control by a central board is more rigid than a system of free wages. Moreover it is of necessity more long-winded and clumsy. Also the Board at the top tends to be a far away, impersonal, and more or less nebulous entity.

During all these years the Board of Government Conciliators has been the scapegoat for everything unsatisfactory to anybody in the field of wages and conditions of employment. Many things have of course been unsatisfactory in our impoverished country since the liberation. The Board must accept the blame for the mistakes which naturally it makes from time to time. And the members, being independent men, do not mind being blamed for many evils in matters of wages, which are no fault of theirs at all ! It is a good thing that discontent can be turned into grumbling at somebody who does not mind and . . . cool off in that process. Being the scapegoat has been a most useful function of the Board.

(f) It is quite understandable that under the economic conditions of the post-war years nobody has ever been fully satisfied with

his own wages. But throughout this whole period the need for the system has been widely recognised both by employers' and by workers' organisations. Their joint backing of this policy in the Foundation of Labour and in the affiliated organisations was of course a necessary condition for the working of the system. But the co-operation of organised employers and workers with the governmental agency which, as I have explained, is in reality a tripartite management of affairs has never broken down during this period. The self-restraint and discipline shown by the workers' organisations and their members are very remarkable. As a result industrial peace has been well maintained.

It is obvious that strikes, at least strikes for a change in wages and other conditions of employment, do not fit into a system under which on the one hand the employers are not free to change labour conditions without permission of the Board of Conciliators and under which on the other hand this Board is supposed to listen impartially to any reasonable representation and has got the power to satisfy, even against the fierce opposition of any of the parties in industry, any reasonable demand made by the other side. Yet strikes are not forbidden. However, apart from a number of wild-cat strikes useful to blow off steam, strikes have only been provoked by communist-ridden trade union groups that are kept outside the Foundation of Labour. Those strikes are more of a political than of an industrial character and they have never brought any benefits to the workers concerned.

And so the system was a blessing for our industrial peace. Both as compared with what happened in Holland after the First World War and as compared with other countries, our post-war figures of days lost by labour disputes have been extremely low; even in our worst post-war year (1946) less than 0·1 per cent. of workable days was lost by trade disputes, in 1951 only 0·01 per cent. I venture to say that this has been a very important factor in the recovery of our country from the disasters of the last war.

21. Of course this whole system involves a restriction of freedom.

I need not discuss at this moment what real freedom was left to the wage earner in the system of individual free bargaining. We all know that the evil results of this system needed correction by collective bargaining, which eliminates part of the inequality of bargaining strengths between the individual worker and his employer.

But under the system of free collective bargaining the settlement of wages is no less a matter of arguments of power, of bargaining strength in the market. The group interests of the two sides are pitched against each other. As long as this is the basis of a wage system, government has only to furnish the means of conciliating the parties, to promote labour peace and to prevent labour conflicts from playing havoc with industrial production. There is then little

justification for restraining the liberties of the parties by compulsory arbitration or by government control of wages because the necessary basis of a national wage policy is lacking.

As soon as the concept of a national policy is introduced and co-ordination of a national wage structure is aimed at, the freedom of the parties, whether of individual or of collective parties, must undergo new restrictions. For not only do the contests between individual wage earners and employers, and the struggle and bargaining between collective parties, continue to some extent, but a new conflict arises: the contest between the more or less combined forces of the employers and workers of every single branch of industry against those in all the others. If a national point of view has to prevail and a general wage structure, a national wage fabric, has to be realised you cannot leave the freedom of the separate branches of industry unimpaired and some system of national control is inevitable. Just as individual workers and employers had to submit to collective bargaining in their industries, losing part of their former freedom, so collective parties have to submit to national control and to give up some of their independence.

22. The post-war wage policy in Holland is legally based on the Extraordinary Decree on Labour Relations.

As the name indicates this was only intended as a temporary measure, conceived for the emergency situation immediately after the war. It was expected that after a short time we should return to so-called normal conditions, *i.e.*, to the pre-war system of free wage-fixing.

Now after nearly eight years the temporary measure is still in full force. But throughout those years we have always toyed with the idea that it would shortly disappear. There are two main lines of thought.

(a) First of all everybody constantly expresses a hope for more freedom and for the lessening of controls. Actually much more freedom in detail is introduced in the daily working of the system than could be allowed in the beginning. This has been possible because of the educational result of the system itself which has stimulated a growing willingness to exercise self-restraint. But the basis of the self-restraint is the ultimate possibility that the central power may impose restraint. We always speak of abolishing this last governmental control. But it is deferred from year to year. Nobody is really willing to abandon it, neither the employers' organisations nor the trade union movement nor the Government unless some other form of general and central control can be found to take its place.

(b) Now many people in Holland think that perhaps our Industrial Organisation Act, 1950, in its future development may provide the way to modification. Under this Act both sides of the various industries may be organised in joint public bodies with wide powers of self-government, while a tripartite Social Economic Council

intended to be the top layer of the whole structure is already in existence and functions as a general advisory body of the Government. Maybe the co-ordinating of wages within the separate branches of industry could be entrusted to these public industrial bodies, while the general co-ordination could be left to the Social Economic Council. With regard to the regulation of wages by the lower industrial bodies the development cannot be predicted because the formation of these bodies is only in its infancy. As to general co-ordination by the Social Economic Council I must remark that this body is not yet equipped for such a job; and it may be doubted whether this tripartite body will be able to create the same effective equilibrium in this respect as has been created by the Foundation of Labour and the Board of Government Conciliators existing as two separate bodies with differing responsibilities but working together very closely.

Thus we continue to follow the path traced by the Emergency Decree of 1945. Everybody grumbles more or less because he cannot have exactly his own way any more. But at heart we are all convinced that our system has worked rather well. And I hope that in describing it I have been able to make its essence clear to you and to show you the valuable elements it contains from the point of view of efficient economic organisation as well as from that of promoting social justice.

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INTERNAL CONFLICTS OF LAWS IN THE GOLD COAST

THE several kinds of law in force in the Gold Coast fall into two main classes. One comprises English law and local Ordinances, and the other the several bodies of customary law of the various tribes inhabiting the country.

Imperial legislation of the usual kinds is in force, dealing mainly with constitutional and external matters, but in addition "the common law, the doctrines of equity, and the statutes of general application which were in force in England on the 24th day of July, 1874" (when a local legislature was first set up) are also incorporated into the law, subject to local Ordinances. There have of course been numerous modifications of English law, of which the most extensive in form, if not in substance, is perhaps the Criminal Code.

But the existence of this complete system of law on the English model is not to "deprive the courts of the right to observe and enforce the observance, or . . . deprive any person of the benefit, of any native law or custom existing in the Gold Coast." Like English law, this customary law is subject to local Ordinances, and is also subject to the further qualification that it must not be "repugnant to natural justice, equity and good conscience." This expression has a rather wider meaning than has "natural justice" in England. Procedural irregularities, of the kind found in English cases about the activities of club committees, do sometimes occur; for example, the members on the benches of native courts still very occasionally change during the hearing of a case, so that a man who has not heard all the evidence may join in the judgment. There was no objection to this in days of old, but the Supreme Court and the Court of Appeal have frequently disapproved the practice and allowed appeals because this has occurred.

Apart from such procedural rules, the "repugnancy" cases are of two main classes: those involving slavery and those involving disturbance of long bona fide possession of land. *Kodieh* v. *Affram* (1930) 1 W.A.C.A. 12, is an example of the former class. After the death of one D a dispute arose between his brother and the Chief of Kumawu in Ashanti (the defendant) over the deceased's property. The former claimed under the normal law; the latter claimed on the ground that the dead man was his retainer, having been presented to him by another chief. The trial judge found that D was "a Stool servant, whose office in the old days was that of executioner, and who nowadays does little more than attend before the chief on state occasions and carry before him the emblem of a

sword." The Asantehene's linguist was called as an expert and stated the custom as follows :

> " When an *ahenkwa* (servant or retainer) of a chief dies all his belongings should be brought before the chief, who may select anything he likes and give the rest to the family (*i.e.*, lineage). I have known cases where a chief's subject has behaved badly and has been banished and given to another chief. In such cases the latter has the sole control of such person and has absolute title to his property, and in olden days could kill him if he pleased. If such a person served as an *ahenkwa*, on his death all his property would be taken by the chief. . . . The present plaintiff would be the deceased's heir if it were not for the fact that the deceased had been presented to the chief."

The court of first instance gave judgment for the chief, but on appeal it was held that the chief's claim was founded on slavery and was therefore repugnant to natural justice.[1]

Descendants of non-Akan slave women held by Akans (including Ashantis) were absorbed by a fiction into the kindred of their fathers, but their true status was always known to the elders of the group and in matters of inheritance they were postponed to true members of " the blood," however distant the relationship may be. (Such slaves' children could not be in fact of the father's group, because the Akans hold that " blood " is transmitted by women only, conferring membership of one of seven recognised clans.) This rule of postponement was considered at length by Hooper J. in 1947 in *Ambradu* v. *Mensah*,[2] " since," he said, " I understand from learned counsel on both sides that incidents of slavery of the nature I have been dealing with . . . are widespread in the Colony." Despite some authority to the contrary before 1894, Hooper J. declined to uphold the rule excluding slave descendants, on three grounds: that is was repugnant to the law of England, and so contrary to the Slaves Emancipation Ordinance of 1874; that it was contrary to the Reaffirmation of the Abolition of Slavery Ordinance, 1930, which " declared and enacted that slavery in any form whatsoever is unlawful and that the legal status of slavery does not exist "; and that it was contrary to natural justice.

The other main type of repugnancy cases comprises those involving the Akan customary rule that " the original owner of the land who has not specifically divested himself of his ownership can after any length of time, and in any circumstances, obtain recovery of his land from persons setting up an adverse title, whatever may be the detriment caused to such persons by the fact that the original

[1] It was also pointed out that the (Imperial) Slavery Abolition Act, 1883, became law in Ashanti when that colony was annexed in 1901. The deceased seems to have amassed a *peculium* (cocoa farms) valuable enough to make it worth taking the case to the West African Court of Appeal.

[2] Sekondi, 1/1947, unreported.

owner chose to sleep on his rights." This quotation is from the *Bokitsi Concession Case* (1903) Renner 293, in which the Full Court gave its opinion (*obiter*) that such a rule was contrary to natural justice. The permissible limits of the right to oust such persons were laid down in *Nkoom* v. *Etsiaku*, 1922 F.C. 1, in words approved by the Court of Appeal in *Ado* v. *Wusu*, 4 W.A.C.A. 1. "The test . . . would appear to be, whether the adverse possession is of such a kind as would lead the persons so holding adversely to believe that they were the owners and as such to have incurred pecuniary responsibilities." If such is the case the possessors will not be turned out.

In the Gold Coast there are five or six distinct regions wherein the customary law differs from that of neighbouring areas, and there is a good deal of migration from one to another, particularly into the forest country which will support cocoa from areas with a drier climate. There are obviously great opportunities for conflicts of laws, not only between English law and customary law, but between different systems of the latter type.

Similar problems arise in any colonial territory, but British jurists have not given the matter nearly as much systematic attention as did the Dutch in the Netherlands East Indies.[3] In that territory the law recognised three groups of people, each subject to a different system of law: Europeans of all kinds and those assimilated to them (including Japanese); foreign Orientals; and the local races. The rules for resolving conflicts of laws in this "interracial" sphere were largely statutory in form, and comprehensive. Correspondingly, in the Gold Coast people are divided into "natives" and "non-natives." "Native" means a person of African descent, but excluding anyone who is not a member of a a "class of persons who have been ordinarily subject to native tribunals." This means that West Indian negroes and Freetownsmen from Sierra Leone, who in their place of origin are subject to law and courts of English type, are non-natives, in addition to Lebanese and French, English and Indians.

Statutory rules are laid down which, even if they rest on an unsound basis,[4] do provide a guide to the choice of law in most cases in this sphere. It is provided that customary law shall be applied "in causes and matters where the parties are natives," and also in causes between native and non-native where either party would suffer substantial injustice from "a strict adherence to the rules of English law." Presumably therefore English law is

[3] See A. A. Schiller, "Conflict of Laws in Indonesia," 2 *Far Eastern Quarterly*, 31.

[4] The rules turn on the personalities of the parties to a dispute, not on the nature of the transaction involved. This gives little help in non-contentious problems, and gives rise to anomalies. Suppose X makes a customary oral will leaving legacies to A, a native, and B, a non-native. When A and B each sue the heir who refuses to hand over the legacies, are the two cases to be judged by different law? Or is a form of *renvoi* to be applied?

prima facie applicable in mixed cases, and indeed the courts have always worked on that assumption. A party may not rely on a rule of customary law if he has agreed, expressly or by implication, that his obligations in connection with the transaction should be regulated exclusively by English law. The rules are rounded off by a stop-gap provision that "in cases were no express rule is applicable to any matter in controversy the court shall be governed by the principles of justice, equity, and good conscience."

These rules are reasonably clear, but some difficulty has been experienced in the past where a statute, particularly the Statute of Limitations, has been in issue. If this statute is one of general application does it apply not only to non-natives but to natives? Although it does not appear expressly in the reports, the doubts in this case seem to spring from the fact that the statute affects procedure, not substantive law. The position was clarified in *Koney* v. *Union Trading Co.* (1934) 2 W.A.C.A. 118, where it was held that statutes were to be treated as part of English law and subject to the general rules for choice of law, of which Kingdon C.J. gave a concise exposition. He pointed out that where the parties are natives, prima facie custom applies and the onus of proving that justice requires otherwise is on the party asking for it to be excluded; but that where one party is a non-native, prima facie custom does not apply, and the onus is on him who seeks its application to prove that substantial injustice would otherwise be done to one of the parties.

Koney was a literate carpenter on whose behalf the defendants had imported as an experiment a light mechanical saw, which proved unsuitable. After more than six years had elapsed plaintiff claimed the return of his money, and defendant pleaded the Statute of Limitations. (There is no limitation of actions in customary law.) Having decided that this statute was one of general application, and therefore in force in the Gold Coast, the court considered the question of "substantial injustice." It must be more than a sense of grievance and hardship consequent on the application of the rule limiting the time for bringing actions to six years. The statute is aimed at cases in which the defendant cannot be expected to have kept available the evidence necessary to answer the plaintiff's case, and there was a "very strong suspicion here that the delay was deliberate." (Kingdon C.J. at p. 192.) Graham Paul J., after pointing out that possible injustice to the non-native had also to be kept in mind, said "This Statute of Limitations is not a recent invention of modern civilisation. It was applied to the state of education and civilisation which existed in England in 1623, and I find nothing at all startling in applying it to an educated African of today." (At p. 196.) It was held that the plaintiff had not discharged the onus of proving substantial injustice in the exclusion of customary law. Clearly the

English rules of private international law, such as that referring matters of procedure and evidence to the *lex fori*, have little relevance to conflicts in this sphere, though they would form a useful guide in cases of "interlocal" conflict, considered hereafter, if the courts cared to use them.

Although normally disputes between natives are governed by native customary law, this rule can, as we have said, be displaced by agreement. "No party shall be entitled to claim the benefit of any local law or custom, if it shall appear either from express contract or from the nature of the transactions out of which any suit or question may have arisen, that such party agreed that his obligations in connection with such transaction [5] should be regulated exclusively by English law." These words appeared in the original Ordinance of 1876. In 1927 the words "or must be taken to have agreed" were inserted after "agreed," but this phrase was dropped in the 1936 revision of the laws, and during its brief existence seems to have made not the slightest difference.

Where there is a clear agreement of course there is no difficulty; and where parties have used a completely English procedure they are "taken to have agreed." So in *Quarshie* v. *Plange*, 1926–29 F.C. 246, it was said (at p. 252), "the parties to the various conveyances, having adopted the English method of sale, are bound by the principle of English law." Difficulty arises however where both customary and English formalities are used, or where some procedure is followed which was not known to ancient custom but which resembles what English law requires. Pledges of land in the Akan areas, particularly Ashanti, may be taken as an example. By ancient orthodox custom a pledge was made orally before witnesses. The lender took possession and gathered the crops as interest, the principal alone usually being repayable, whenever the borrower could make the effort. (There was a nominal right to foreclose on giving notice, but at least in earlier days the transaction could always be reopened for a consideration.) Thanks largely to Sarbah's book, discussed later, the Supreme Court still regards the passing of possession as the key test of a customary pledge. (See *Teye Norh* v. *Gbedemah*, *infra*, and *Asafu Adjei* v. *Dabanka*, 1 W.A.C.A. 63, an Ashanti case.) When the knowledge of writing spread it became a habit to make a note of the transaction, and the practice developed of the borrower being left in possession, undertaking to pay the usual rate of interest for unsecured loans (50 per cent. irrespective of time). In addition a short term was agreed and an express power of sale conferred. *Adu Sei* v. *Ofori*, *infra*, is a typical case. This

[5] In *Mensah* v. *Aikins* (1899) Ren. 167, the court applied English law at both counsel's request, apparently considering seduction a transaction covered by this provision.

development may have been due to the influence of English mortgages, or to the certain record provided by a document, the evidence of actual possession not being necessary to prove the transaction. Latterly various refinements have appeared. The pledger may be left in possession, or rather put back in possession, as the pledgee's agent, the gross profits being divided as for a normal share-cropping tenancy (*i.e.*, one-third to the pledger-tenant, two-thirds to the pledgee); or the takings may be divided so that the pledge is self-liquidating: one-third to pledger, one-third to pledgee as interest, one third in reduction of principal.[6]

It is quite certain that the majority of those who go through these transactions have no intention that their "obligations should be regulated *exclusively* by English law." The Supreme Court however refuses to regard these pledges as acts recognised by customary law. The issue is partly confused by the question of what age a usage must have before it is good law. There is remarkably little authority on the point, though one case,[7] probably bad law,[8] would apply the English rule about "immemorial age" (A.D. 1189) and another[9] puts the latest permitted date at 1876. Generally accepted usage, on the lines of commercial customs in England, is far more appropriate, though as with commercial law[10] the dead hand of precedent, especially in the strict modern form of the doctrine,[11] would still petrify outmoded customary law.[12]

When the court holds that the requirements of a customary pledge have not been fulfilled, in default of "any express rule" of customary law as to what should be done (and any such rule could hardly be expected on this view of the law), it might be expected that the court would be "governed by the principles of justice, equity, and good conscience." These principles are not referred to, but whether on this basis or some other, in fact these

[6] This means 100 per cent. interest, it is true, but in fact is likely to be better for the borrower than other forms because of its automatic termination. In *Adu Sei's Case* £100 was borrowed, repayable in seven months with £50 interest. When the farm was sold for £109 after two and a half years he had paid £100 as interest and £20 of the principal, £80 of the principal and £39 expenses still being owing. The courts have power to reopen and adjust these agreements.

[7] *Welbeck* v. *Brown* (1882) Sarbah F.L.R. 185.

[8] Griffiths, lately C.J., in answer to the West African Lands Committee of 1913 (Colonial Office, African (West), 1047, Minutes of Evidence, Questions 14259, 14292).

[9] *Mensah* v. *Wiaboe*, 1921–25 Div.Ct. 170.

[10] Compare *Ireland* v. *Livingston*, L.R. 5 H.L. 395, with *Diamond Alkali Export Co.* v. *F. Bourgeois* [1921] 3 K.B. 443. Even Lord Mansfield was obliged on occasion to conform to a precedent enshrining out-of-date usage: *Edie* v. *East India Co.* (1761) 2 Burr. 1216, at p. 1222.

[11] See Dr. C. K. Allen's reply (51 L.Q.R. 333) to Holdsworth's criticism (50 L.Q.R. 180) of Professor A. L. Goodhart's views (50 L.Q.R. 40, 196). The West African Court of Appeal applies the same rules as the English Court of Appeal: *Amadu* v. *Osumanu* (1948, unreported).

[12] It does not appear that counsel have even attempted to uphold such pledges as valid in modern customary law, an admittedly onerous task.

pledges are tested by the rules of English equity jurisprudence. Two leading cases may be contrasted as examples. In *Teye Norh* v. *Gbedemah*, 1926–29 F.C. 395, a customary oral pledge before witnesses was effected. This was held to be valid and to bind the parties even though an informal document to similar effect, with an express power of sale, was very soon afterwards drawn up. The plaintiff failed to discharge the onus upon him of showing that in making this document the parties intended to be governed by English law alone. The case was distinguished from *Adu Sei* v. *Ofori*, 1926–29 F.C. 87. There, another typical professional letter-writer's document purported to create a charge on a farm as security for a loan, and in default of payment gave the lender "full right to apply for legal measure against me at any court of supremacy for its recovery, or to have the above-named property disposed of by public auction." The property was sold. The court held there was no customary pledge (the pledger having remained in possession); that there was no mortgage at common law (title not having passed); but, as counsel argued, that there was an equitable charge, and as application had not been made to the court for its enforcement the alleged sale constituted a trespass.

Even within the scope which the Ordinance allows to customary law, however, its field of operation has not been as wide as might be expected. Conditions have favoured the predominance of English law: most judges have been English or Irish; members of the Bar, though mostly African, have been English-trained; and English law is a comprehensive system of easily ascertained rules, much easier to apply than an incomplete, uncertain, largely unrecorded changing body of rules of uncertain geographical limits.

There are many examples of delictual actions between Africans which have been determined by English law without any reference to native custom or the problem of choice of law. Not infrequently the result, as in the pledge cases, has been a decision different from that which a native court would give on the same facts. Most bodies of customary law, for example, give a remedy for abusive or derogatory remarks, irrespective of whether they are oral or written, and of the "civil" or "criminal" nature of the acts alleged. The early reports however abound in actions for defamation between Africans decided without argument according to English law. Since 1910 these cases have been less frequent, for since then the Supreme Court has been obliged, not merely permitted, to decline cases "properly cognisable" by native courts. As the jurisdiction of the highest grade of these courts in money claims is limited to £100 however, large claims may still come before the Supreme Court initially. *Amoah* v. *Djabi* (1925) 1926–29 Div.Ct. 43, is an example. The judgment was based on a passage in *Addison on Torts* and a decision of Mansfield C.J.

In 1947 an exchange of pleasantries between two Ga chiefs led to an action "for slander." The judge held the words were "defamatory, and as they import a crime to plaintiff he is entitled to recover damages." [13] In *Cheetham* v. *Bannerman* [14] on the other hand the plaintiff failed because he did not prove either that the words "imported a crime" or that he suffered special damages.

Other wrongs for which Africans have sued Africans but which have been treated as common law torts include malicious prosecution, false imprisonment and conversion.[15] Most, probably all, bodies of customary law in the Gold Coast contain rules giving or withholding a remedy for the acts committed in these cases, though they may not be the same rules as those of English law. The Courts Ordinance provides, as we have seen, that "where no express rule is applicable to any matter in controversy the court shall be governed by the principles of justice, equity and good conscience"; but in applying English law to cases like the foregoing the courts make no pretence that that law is the embodiment of "justice, equity and good conscience," applied in the absence of any "express rule" of customary law; they do not consider the possibility that such a rule may exist.

There is one important class of case, becoming more frequent with the increase in wealth and literacy, in which English law has supplanted native custom; that is, in the matter of testate succession. The Wills Act, 1837, being a statute "of general application" in force in 1874, is part of the law of the land; but it is part of the English law of the land, the boundary between which and native custom is fixed by the Courts Ordinance. That Ordinance states that native customary law "shall be deemed applicable in causes where the parties are natives, particularly . . . in causes and matters relating to . . . inheritance and testamentary dispositions." It would appear therefore on analogy with *Koney* v. *Union Trading Co., supra*, that natives cannot use the Wills Act to control the disposition of their property when they die. That disposition must be governed by the rules of the appropriate body of customary law. Nevertheless it has long been established that natives can make effective statutory wills in the same way as non-natives, and the practice seems never to have been questioned. The rule was established many years ago, when the Supreme Court often overlooked personality as the guide to the choice of law, and the practice is now too well established to be challenged.

In permitting secret, revocable dispositions, made not in fear of death, and without reference to the claims of blood relations, the Wills Act goes further than any body of customary law in the Gold

[13] *Nii Bonne III* v. *Osu Manche*, Accra 92/47, unreported.
[14] (1881) Ren. 54.
[15] See respectively, for example, *Kwakyi* v. *Bandoh* (1938) 4 W.A.C.A. 197; *Yaw* v. *Bekoe* (1934) 1931–37 Div.Ct. 79; *Mensah* v. *Wiaboe* (1925) 1921–25 Div.Ct. 170.

Coast. The law of succession among the Ashanti, who form one branch of the Akan, may be taken as an example. The ordinary rules of inheritance are based on the lineage, which is a group of persons of both sexes tracing blood connection through women. A man's successor is his brother (*i.e.*, his mother's son) or his nephew (*i.e.*, his mother's daughter's son). Since his wife must be of a different lineage from himself, and since the children derive their "blood" from their mother, it is clear that a man's son never inherits his property, unless the father can take positive steps to ensure that he does so in defeasance of the ordinary rules. This may have been the impulse which led to the development of a form of nuncupative will, or perhaps more correctly, of *donatio mortis causa*. A man may make a gift of his self-acquired property, to take effect on death by the ordinary formalities necessary for transfers of property and other forms of agreement *inter vivos;* that is, the transferee must pay *aseda*, "thanksgiving," to the transferor, who retains some and distributes the remainder among those called together to witness the transaction. In the case of a "will" some of the *aseda* must be paid to the elders of the donor's lineage. If they accept it, this signifies their agreement to the transaction and the surrender of the rights they would otherwise have to the property, on the donor's death. Any such gift must be reasonable, and if it is, will be upheld (anyway today) despite the refusal of the lineage to agree. "Reasonableness" depends on all the circumstances, of which the two most important are perhaps the reciprocal duties of the lineage and its members to succour each other, and the services rendered to the donor by the donee. For example, if the donee is a favourite nephew, though not the eldest son of the eldest sister who would have a prior claim to consideration, there is a fair degree of freedom, for the property is not lost to the lineage; but if the donee is a son, this freedom is more limited. A common reason for supplanting the "heir presumptive" is that he (and perhaps others of the lineage) failed to help the donor farm or failed to look after him in his last illness.

It is clear that the English will and the Ashanti *nsaman-nse* are very different institutions. It may be said that wills under the Act should be upheld so far as the testator makes dispositions which customary law allows him to make by other means, and possibly some such synthesis could have been worked out. There are advantages in having a written record—and it is now common to make memoranda of customary wills—but there are dangers in secrecy. In particular it might (and under the present law does) enable a man to circumvent the requirement of reasonableness and the just claims of the lineage. Even England has recently found it desirable to restrict the testator's freedom, as New Zealand did a number of years earlier.

In the circumstances so far considered the conflict has been between English law and customary law. But even when it has been decided that the latter should be applied to a particular case, that may not give a rule of decision, for a choice may still lie between two or more bodies of customary law; and for this the Ordinance gives no guidance, treating native customary law as a single body of rules. In Netherlands Indies law also there was very little legislation dealing with "interlocal" conflict, but in contrast to British territories there was a great volume of work by jurists, and the principles applicable had been well worked out.

Few cases involving such a conflict in fact seem to reach the superior courts, but it is still essential that they should recognise the existence of different bodies of customary law. Before this is discussed however a word must be said by way of background about four of the groups of people who inhabit the central and southern part of the Gold Coast. In the extreme south-east, on the eastern side of the Volta River, is the Ewe group, stretching from the coast up into the Togoland hills. They are fundamentally patrilineal people, though for certain purposes they recognise matrilineal ties. Across the Volta, in a narrow strip along the coast as far west as Accra, lie the Ga-Adangbes, a group of patrilineal peoples (though this description needs qualification in parts of some Ga towns). On the plain between the Ga-Adangbes and the Akwapim hills further inland live the Krobos, also patrilineal. North and west of these areas, covering nearly all Ashanti and the greater part of the country between Ashanti and the sea, live the strongly matrilineal Akan groups, of whom the Ashanti, Akim, Akwapim and Fante are some. They are a numerous people in all, and by historical accident the Fante are the most significant in the present connection. The centre of British influence was for many formative years at Cape Coast in Fante country, and British judges have worked there for more than 120 years. Furthermore, Sarbah's *Fanti Customary Law*, which first appeared in 1897, was for long the only book on any body of customary law, and despite its imperfections remains an influential work.[16]

Occasionally cases which contain the seeds of "interlocal" conflict do come before the courts but it is very rarely found necessary to face the issue. In *Nyarko* v. *Atiadevie*, 1931–37 Div.Ct. 120, an Ewe from French Togoland lent money to an Akan in return for a pledge of Akan land. The court found that a good customary pledge had been made—presumably by Akan (in this case Akwapim) custom, though the body of custom in question was not particularised. The judgment distinguished *Teye Norh* v. *Gbedemah*, 1926–29 F.C. 395 (already referred to), wherein it was

[16] There has always been provision for reference to books on "public history, literature, science, or art," but though Sarbah's book was freely used during his lifetime, not until 1951 was express provision made for the courts using books on customary law as evidence. (Ordinance 39/51.)

held also that "the requirements of native customary law as to the execution of a native mortgage or pledge had been complied with" (p. 398). It appears from the names of people and places that this case concerned a pledge by a Krobo of land in an Akan state (Akim) to a Ga (Accra) man; but at no point was the proper customary law specified, Sarbah's definition being quoted and applied *tout court*.

The general character of the law of different peoples at the same stage of economic development is fundamentally similar, and this is not only true of people living close to each other, but is generally valid.[17] Although the Akan are matrilineal and the Ewe and Ga-Adangbe are patrilineal the rules about land tenure for example are likely to be much the same in each group. In matters of inheritance however there are sharp differences, for although the rules in each case are based on the kindred group, the lineage, in one case the members of this group trace the connection through their mothers, and in the other two through their fathers.

The courts are faced with a difficult task. Customary law is unrecorded and often uncertain, and reliable information is hard to get. They have failed nevertheless to appreciate this divergence, and have failed to build up an intelligible body of case law outside the Akan areas. In 1931 the Privy Council suggested in *Amissah* v. *Krabah*, 2 W.A.C.A. 31, that "it would be very convenient if the courts in West Africa in suitable cases would rule as to the native customs of which they think it proper to take judicial notice specifying of course the tribes (or districts) concerned and taking steps to see that these rulings are reported in a readily accessible form." It cannot be said that the existing reports go far towards meeting this request.

The reported cases show the various influences at work. In *Quarm* v. *Yanka II*, 1 W.A.C.A. 80, at 83, it was said, "This evidence as is usual in cases where native custom is concerned is obviously shaped to meet the special circumstances of the case, and is somewhat contradictory. Luckily however in this matter we have authority to guide us. In Mr. Sarbah's book on Fanti Customary Law . . ." This was a Fante case. *Asafu Adjei* v. *Dabanka*, 1 W.A.C.A. 63, however, was a purely Ashanti case, about what the Court of Appeal called a "native mortgage." After stating the rule to be applied the court continued: "This is made clear from the following passage which occurs in the *Fanti Customary Law*. . . ."

These two cases concerned different branches of the Akans,

[17] *Cf.* Dr. Max Gluckman, speaking of Indonesia, in *Journal of Comparative Legislation*, 3rd Series, XXXI, 60: "What strikes me, as an anthropologist whose special province is negro Africa, is the fundamental similarity between adat law and African law. It does seem as if the limitations of primitive economics, and the organisation of small local communities on a framework of kinship ties, produce similar legal results."

who in this particular and in many others, but by no means all, have identical rules of law; and Sarbah himself makes sweeping claims for the scope of the rules he enunciates: "Fanti laws and customs apply to all Akans and Fantis, and to all persons whose mothers are of Akan or Fanti race." [18]

Kofi v. *Kofi* (1933) 1 W.A.C.A. 284, was also a case about land, but concerned Ewes and Ewe land. "The reasons of the native court in coming to the conclusion that there was no sale according to native custom," said Horne J., "appear from the authorities Redwar and Sarbah to be sufficient. There was no evidence of tradition as to the price paid, whether as *guaha* or as *ntrimma* . . ." *Guaha* and *trama* (*ntrimma*) are Akan names for Akan legal conceptions, though what system of native custom the judge was referring to he did not say. The mere possibility that details of the two systems are the same seems hardly enough justification for judging non-Akan cases by Akan law.

In matters of Ewe and Ga-Adangbe succession the case law is even more dubious and obscure. In *Kodadja* v. *Tekpo*, 1929–31 Div.Ct. 45, an Ewe case, Deane C.J. found for the plaintiff, "succession in his tribe being from father to son" (a proposition which the defendant did not dispute). In *Dzadu* v. *Brihimian* (1948) 9 W.A.C.A. 137, both parties claimed as descendants in the male line, and this was not questioned. But a month later in *Chapman* v. *C.F.A.O.*, 9 W.A.C.A. 181, another Ewe case, the court said (at p. 185), "Ocloo III was the son of Ocloo I. As according to native law and custom property descends through the female line it follows that Ocloo III could not succeed to the property of Ocloo I. Nor could he for the same reason succeed to the properties of W. K. Chapman, alias Ocloo II." The court did not say what body of native law and custom they were referring to nor did they cite authority for the proposition enunciated.

It seems that in fact the Ewe speaking people recognise both patrilineal and matrilineal connections in different circumstances, but it is impossible from reported cases to say what those circumstances are or whether the same rules are applicable throughout this group of states.

Similar considerations apply to succession cases among the Gas. In 1947, in a case "relating to the law of the devolution of real property in the Ga state" one judge was moved to say: "Were it not for long service in West Africa it would appear to me to be not only incredible but impossible that such a divergence of opinion could exist upon such a fundamental point of law as to who are the persons entitled to an estate in that land in the circumstances already described. It is equally clear that despite the passage of many years and many judges, there is very little authority whereby

[18] *Fanti Customary Law*, p. 15.

one can pronounce upon this matter with any degree of certainty." [19]

The truth is the Ga-speaking people are not homogeneous; customs vary, and particular care is necessary in defining the ambit of any custom in issue. An anthropologist has stated the rules generally applicable throughout the state thus: "When a man dies all the elders of his family [*scil.*, his patrilineage] meet to decide how his property shall be distributed. There are no rigid laws of inheritance . . . only certain very usual practices which the elders are at liberty to modify. . . . A man's goods are inherited by his brother before they come to his sons . . . daughters as well as sons receive shares." [20] As far as Accra town goes however the Court of Appeal has recently determined (after some conflict of authority) that the custom is matrilineal, not patrilineal, and has explained the "share of the property" which goes to the children of a six-cloth marriage as merely a "right of support." [21]

Briefly then, the Courts Ordinance provides that native custom governs disputes between natives, and also disputes between native and non-native if necessary to prevent substantial injustice. But this customary law must not be contrary to general English ideas of natural justice. It will also be excluded if the parties agree to be governed by English law. It is not always easy, particularly where writing has been used, to decide whether such an agreement has been made. There are common modern forms of written pledge used by Africans, but the Supreme Court regards these as English equitable pledges if possession has not passed as required by the ancient oral pledge. Even in delictual actions between natives English law is often applied with no obvious justification, and English wills are freely used. No rules are laid down for "inter-local" conflict and these very rarely arise in fact. Even so it is essential to appreciate the scope and content of different bodies of customary law, but the Supreme Court tends to apply the law of the matrilineal Akans to the predominantly patrilineal groups of the south-east.

J. N. Matson.*

[19] *Ankrah* v. *Captan*, Accra 112/47, unreported.
[20] M. J. Field, *Social Organisation of the Ga People*, pp. 43–5.
[21] *Vanderpuye* v. *Botchway*, Civil Appeal 105/48, unreported. For children's rights under a six-cloth marriage see, in contrast, *Solomon* v. *Botchway*, 9 W.A.C.A. 127.

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STATUTES AND STATUTORY INSTRUMENTS

Prevention of Crime Act, 1953

The Prevention of Crime Act, 1953, is an attempt to grapple with the serious rise in crimes of personal violence. Some idea of the gravity of the position may be obtained by comparing the figures of violent crimes known to the police to have been committed in 1938 with the corresponding figures during the post-war period. Taking, first, cases of armed robbery, robbery with violence and assault with intent to rob, in 1938 the figure was 287, which contrasts sharply with a total of 979 such offences in 1947, 1,101 in 1948, 990 in 1949, 1,021 in 1950 and 800 in 1951, which is the last year for which figures are available. Cases of felonious wounding have continued to rise from 388 in 1938, to 572 in 1947, 646 in 1948, 625 in 1949, 976 in 1950, and 1,078 in 1951. A similar picture is portrayed with cases of malicious wounding where a total of 1,602 in 1938 may be compared with 2,908 in 1947, 3,547 in 1948, 3,705 in 1949, 4,201 in 1950 and 4,445 in 1951.

Whilst it is true that many of these cases did not necessarily involve the use of offensive weapons, there is abundant evidence that in an increasingly large number of crimes of personal violence the present-day criminal has no compunction in using a variety of weapons to achieve his purpose. As the law stood before the present enactment, however, the police were powerless to apprehend a person found in suspicious circumstances in a public place carrying an offensive weapon. That is, unless the weapon was a lethal or imitation firearm, which is already provided for in the Firearms Act, 1937, ss. 22 and 23, or unless the person was at a public meeting or a public procession, which constitutes an offence under the Public Order Act, 1936, s. 4. Additional powers are now conferred upon the police by the Prevention of Crime Act, 1953, which creates a new criminal offence.

Under the present enactment, any person who is found in a public place carrying an offensive weapon without lawful authority or reasonable excuse, the burden of proof being placed on the accused, commits an offence punishable with a maximum of two years' imprisonment. For the purposes of the Act a "public place" includes any highway and any other premises to which at the material time the public have a right of access, a definition sufficiently wide to include, for example, banks, post-offices, public parks and libraries, and railway stations. Whereas in the Public Order Act, 1936, s. 4, no definition is attempted of an "offensive weapon," the present statute indicates with some precision the type of instruments at which the new offence is aimed. They are divided

into three categories. First, articles made for causing injury to the person, such as stilettos, life-preservers and knuckledusters; secondly, articles adapted for use for causing injury, such as a sock filled with sand or a wooden bludgeon with a razor blade inserted in it; and finally, articles intended for use for causing injury to the person, which would include items in everyday use for legitimate purposes, such as bicycle chains, knives, scissors, Indian clubs, pick-shafts, chair-legs and bottles. To establish that an article comes within the third category the prosecution must satisfy the court that there are sufficient grounds for the belief that it was carried with intent to use it for causing injury. This is an important safeguard for an innocent person.

Assuming the court is satisfied that the article found on the accused is an offensive weapon within one of these three categories, the burden of proving his innocence is then placed by the statute upon the accused who, to succeed, must show that he had lawful authority or reasonable excuse for carrying the instrument. Much capital was sought to be made in the debates on the Bill on this reversal of the general rule that in criminal cases the burden of proof is on the prosecution. Whilst it is certainly necessary to scrutinise carefully any derogation from this well-established principle, it must be pointed out that the present example is far from being the drastic and exceptional measure which the public were led to believe it to be. Similar provisions will be found, for example, in the Customs Consolidation Act, 1876, ss. 191 and 259; the Public Stores Act, 1875, ss. 4 and 7; the Customs and Inland Revenue Act, 1878, s. 19; the Merchandise Marks Act, 1887, ss. 2 and 5; the Stamp Act, 1891, s. 13; the Official Secrets Act, 1911, ss. 1 and 2; the Forgery Act, 1913, ss. 8, 9 and 10; the Larceny Act, 1916, s. 28; the Prevention of Corruption Act, 1916, s. 2; the Coinage Offences Act, 1936, ss. 6, 7, 8, 9 and 10; the Companies Act, 1948, s. 411; and the Vehicles (Excise) Act, 1949, s. 22.

Although the Prevention of Crime Act, 1953, gives no power of search and does not empower the police to stop and search a passer-by, it does add to the sprawling instances in which a constable may arrest without warrant. He may so arrest any person whom he has reasonable cause to believe to be carrying an offensive weapon without lawful authority, if (1) he is not satisfied about that person's identity or place of residence, or (2) if he reasonably believes it to be necessary in order to prevent a crime being committed. There is no use decrying this further encroachment on the liberty of the subject. The serious rise in crimes of personal violence must be halted, and whereas no false hopes should be entertained that this new measure, in itself, will stamp out violent crime it is significant that the police, to whom after all the public look as the principal agency for preventing crime, believe it will prove of great value in diminishing such crime. Legislation creating new criminal offences must always be regarded with suspicion, but with the

statute under review there is every reason to acknowledge the fact that its introduction was a necessity dictated by the post-war wave of crimes of personal violence.

J. Ll. J. Edwards.

Coastal Flooding (Emergency Provisions) Act, 1953

The problems of compensation and restoration in cases of major disasters such as the east coast floods early this year are not easily solved. How far ought those who live near the sea to accept the risks or insure against them? How far ought the general taxpayer to be a universal insurer of his brethren against disasters, and if he is to be such in "major" disasters what is "major"? How far ought opportunities to be left for private charity in the interests of the national spiritual health? Such questions are only the most obvious, and a full study of public and official reactions to the floods, which might show the trend of opinion, would be a considerable undertaking. The obvious official reaction was the Coastal Flooding (Emergency Provisions) Act, 1953, the obvious unofficial reaction—the Lord Mayor's Fund. Neither, however, really indicates the true measure of activity. Thus the State contribution is much greater than this contrast suggests; the Fund itself consists of government grants on a pound-for-pound basis, and considerable concealed State grants exist in disbursements through the National Assistance Board, services rendered by the Armed Forces, and in the ultimate accounting with local authorities (who themselves bear many of the burdens).

In effect the Fund is concerned primarily with private interest and private loss, supplementing what can be done through existing machinery. The Coastal Flooding (Emergency Provisions) Act, 1953, is simply concerned with the national interest. The national interest in the flooded areas is two-fold. There is first the need to restore the sea defences, and secondly the need to restore agricultural land. As to the former, the Act makes provision for quick authorisation (for a limited time) of access to land to get material for dykes or to erect dykes where either the dykes were affected by the floods, or, being in the flooded area, were inadequate. Delays which might be caused by other legislation, such as the Town and Country Planning Act, 1947, or the Public Utilities (Street Works) Act, 1950, are removed. It is perhaps a mark of the modern attitude that section 11 of the Act provides that no authorisation of works shall be given until draft regulations for compensation have been presented to Parliament. These regulations (The Coastal Flooding (Compensation for Emergency Works) Order, 1953, S.I. 1953, No. 1011) have now been made, and cover loss to the occupier caused by work on his land.

The other way in which the national interest was affected in regard to agricultural land is also covered by the Act by a mixture

of rewards and threats. By section 18 the Act provides in general terms for various modes of restoring the land, the details to be completed by the Minister. In order to assist and hasten the process provision is made for " acreage payments " in respect of farms and allotments. In these lies the inducement to adopt one of the modes, and naturally enough provision is made in the appropriate regulations for their reduction if in the opinion of the Minister the recovery of the land will be delayed by the negligence or default of the occupier. In addition there is a threat. The speed and manner in which the occupier carries out the rehabilitation of the land is to be taken into account in determining whether or not he is farming in accordance with the rules of good husbandry under Part II of the Agriculture Act, 1947, and hence the rehabilitation scheme is reinforced by the penalties of the latter Act.

The Act might seem to be a very slight reaction to a major disaster. That though is probably a wrong judgment. As has been indicated, much has been and is being done outside its scope. It would perhaps be fairer to regard the limited scope of the Act as a tribute to the amount that can be done under the ordinary existing machinery of government to meet sudden calamities.

J. D. B. Mitchell.

Summary Jurisdiction Act (Northern Ireland), 1953

Pre-trial Publicity

After a turbulent passage, in the course of which a concerted and, at times, virulent campaign was waged against it by the Press, section 42 of the Summary Jurisdiction Act (Northern Ireland), 1953, has succeeded in introducing into Ulster [1] a measure of reform, long overdue in our own system of criminal justice,[2] whereby restrictions are imposed on newspaper reports of preliminary hearings. To achieve this object the section makes two provisions, one absolute and the other discretionary. In the first place, no publication is permitted of any opening statement made by the prosecution. In addition, discretionary power is given to the examining magistrate to make an order prohibiting the publication of any evidence in either of the following circumstances—(1) where the admissibility of such evidence is objected to by the accused and the magistrate is satisfied that such objection is made in good faith,

[1] Comparison may be made with the Republic of Eire's Criminal Justice Act, 1951, s. 20 (1), under which the District Court, when conducting a preliminary hearing, is authorised to adopt any one or more of the following courses: (a) exclude the public, but not bona fide representatives of the Press, from the court during the hearing, (b) prohibit the publication of information in relation to the proceedings, (c) impose restrictions on publication.

[2] See a note on " Pre-trial Publicity " in (1952) 15 M.L.R. p. 98, which was quoted by the Northern Ireland Minister of Home Affairs during the second reading of the Bill, and also (1953) *Journal of Criminal Law*, Vol. 67, pp. 288–90.

(2) whether or not any such objection is made, where the magistrate is of the opinion that the publication of such evidence would prejudice the trial of the accused.

These provisions, it is interesting to note, represent a considerable withdrawal from the original proposal under which only certain innocuous particulars [3] were to be allowed to be published before "the relevant date." When it is realised that "the relevant date"—upon which the entire proceedings at the preliminary hearing were free to be published—was to be the date of conviction or acquittal in the case of an accused returned for trial, and three months after the conclusion of the preliminary proceedings in the case of an accused not returned for trial, it is not difficult to appreciate the Press comment that by such time the report would be stale news and not worth publishing. To state that, under the original proposal, publication was not restricted but only postponed was lacking in understanding of the position of modern newspapers. One alternative suggestion mooted at the time was to give the accused himself the right to decide whether the preliminary proceedings should be reported or not, but if the accused is not legally represented there is always the possibility that he would not fully appreciate the importance of such a decision. The solution finally adopted was to confer upon the examining magistrate the responsibility of deciding whether or not to make an order for restricted publication. This, too, has been criticised on the ground that it imposes an intolerable burden on the magistrate, who may be easily deceived by specious arguments in favour of publicity. The converse, of course, is equally true and, in Northern Ireland, where the duty of conducting preliminary investigations is carried out not by lay justices but by resident magistrates, legally qualified and with considerable practising experience,[4] the danger is minimised to such a degree as to justify being ignored.

In considering this problem of pre-trial publicity it is essential to have a clear understanding of the nature of a preliminary hearing. The principal function of examining justices is to determine whether or not there is a prima facie case against the defendant, justifying his committal for trial at quarter sessions or the assizes.[5] It is no part of the magistrates' duty in such cases to decide whether the accused is guilty or innocent of the crime charged. That responsibility lies in the hands of the jury at the subsequent trial. The preliminary hearing, it must be emphasised, is not a trial in the

[3] These particulars were: (a) the names and addresses of the prosecutor, the accused, and of the witnesses, (b) the names of the presiding magistrate, solicitors and counsel taking part, (c) a summary of the charge and (d) the order made by the court.

[4] The minimum qualification for a resident magistrate is that he has six years' practising experience either as a barrister or as a solicitor. Justices of the Peace in Northern Ireland do not, for all practical purposes, exercise any criminal jurisdiction.

[5] For a recent illustration of a bench of magistrates exceeding this function, see *Card* v. *Salmon* [1953] 1 All E.R. 324.

true sense of the word, as is illustrated by the fact that when the examining magistrates refuse to commit the defendant for trial, the prosecution, if and when it obtains possession of additional evidence, may seek afresh to indict the same defendant with the same offence. The accused will not be allowed to plead *autrefois acquit* to this resuscitated charge, since the original decision of the magistrates does not amount to an acquittal. Another function of the examining justices is to take depositions, thus recording the witnesses' testimony which, in the event of a witness dying or becoming insane or very ill, may still be available for presentation to the jury. Considering the very limited character of these functions there is rather a hollow ring about the cry that any restriction on newspaper reports of preliminary proceedings prevents the fulfilment of the principle that justice should be seen to have been done.

By generally sitting in the same court-room as that where summary jurisdiction is exercised the belief has grown and is widely held that examining magistrates, in conducting a preliminary hearing, constitute a court of law in which the Press and the general public have a right to attend. This is not so. In England and Wales under the Indictable Offences Act, 1848, s. 19, and in Ireland under the Petty Sessions Act (Ireland), 1851, s. 9 (2), it has long been laid down that the room or building used for preliminary proceedings " shall not be deemed an open court for that purpose." [6] The respective statutes continue that " it shall be lawful for such justices, in their discretion, to order that no person shall have access to or remain in such room or building without the permission of such justices, if it appears to them that the ends of justice will be best answered by so doing." This provision, generally overlooked or forgotten by magistrates and certainly exercised on rare occasions only,[7] is now repeated in a truncated form in the Magistrates' Courts Act, 1952, s. 4 (2), which simply states that " examining justices shall not be obliged to sit in open court."

In the light of the existing law and having regard to the purposes served by a preliminary hearing, we may consider briefly the arguments propounded for and against section 42 of the Northern Ireland Act. The case against the reform embodied in this section is generally said to rest on its interference with the freedom of the Press. It is argued, quite justifiably, that under the new law the public at large will have denied to them information which is available to those persons present in court during the preliminary

[6] In Scottish criminal procedure there is no preliminary hearing. The defence is enabled to anticipate the case to be answered by the right to receive in advance a list of the prosecution's witnesses and proposed exhibits. In murder cases or where the defence has met with unusual difficulty in preparing the case, it is the practice for the Crown to give to the defence copies of the precognitions of Crown witnesses.

[7] The most recent exercise of this power was in the case of *R.* v. *Gordon* in Belfast earlier this year, the preliminary hearing taking place shortly before the Royal Assent was given to the Summary Jurisdiction Act.

hearing and who are free to disseminate it without any restrictions. The likelihood of garbled versions circulating as to what transpired in the magistrates' court, added to which the wildest rumours are likely to abound, may be said to constitute a far more potent source of prejudice to justice than a factual, untarnished account of the proceedings in the Press. To the argument that Northern Ireland is a small place and that newspaper reports of preliminary investigations into spectacular cases will make it impossible to empanel a jury which has not read and discussed the entire evidence beforehand, the answer is fairly made that the same situation exists in England and Wales where, hitherto, similar restrictions on pre-trial newspaper reports have not received legislative sanction.[8] With our innumerable local and provincial newspapers, not to mention the national Press, it is certain that the general public, in any part of the country, is kept fully acquainted with proceedings in the local magistrates' courts.

The case in favour of reform rests on the principle that nothing must be allowed to prejudice the accused's right to a fair, unbiased trial which, it is claimed, is denied to the accused under the procedure at present operative in this country. Whereas the defendant has every right at the preliminary hearing to contest the case made out against him and, if necessary, to call witnesses on his own behalf, the general pattern of such proceedings is for the evidence for the prosecution only to be disclosed. In allowing the publication in full of this evidence it is difficult to offset the prejudice created in the minds of members of the jury who happen to have read the newspaper report and thus acquired a one-sided version of the case. Equally damaging is the publication of evidence, such as a confession, which, though allowed by the examining magistrate, is ruled inadmissible by the trial judge. Such a contingency is expressly covered in the Northern Ireland statute, but it remains as a recurring possibility under our present law. All the warnings of judge and counsel at the trial are unlikely to dispel altogether the initial impression created in the mind of a juryman who has read the newspaper report of the preliminary proceedings. The difficulty, of course, is the reinforcing of these arguments with specific instances, it being considered improper to inquire of members of the jury whether they were influenced by what they had read before the trial. There is need here for an impartial, objective study of this problem and it would surely make illuminating reading.

Such then, in broad outline, are the opposing views on pre-trial

[8] In April, 1949, the Home Secretary when asked by a questioner whether the Government would introduce legislation to prevent the publication of newspaper reports of cases committed for trial by jury until after the jury's verdict had been given, replied that no such legislation was contemplated. In the opinion of Mr. Ede "if a case was not committed for trial as a result of proceedings which took place in secret, there might be insinuations which would be very harmful to the traditions of British justice": *H.C. Debates* (1949), Vol. 463, cols. 3023–3024.

publicity. They may be said to involve the balancing of two principal considerations. On the one hand, there is the danger that by preventing a full report of the proceedings the impression may circulate that part of a criminal case may be conveniently suppressed —on the other hand, there is the danger of an unfair trial caused by the prejudice resulting from the wide publicity afforded to the prosecution's case before the actual trial. Which of these considerations should prevail? Can there be any doubt that in such a conflict of principle the paramount motive must be to ensure a trial wherein the accused's guilt or innocence is determined by a jury entirely free from any preconceived notions concerning the case, and reaching their decision solely on the evidence presented before it at the trial? The Summary Jurisdiction Act (Northern Ireland), 1953, s. 42, goes part of the way towards achieving this objective, and the experience gained in operating this modified scheme should prove an invaluable guide and stimulus to introducing similar legislation in this country.

J. Ll. J. Edwards.

Central African Federation

The Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953 (*S.I.* 1953, *No.* 1199)

No constitutional experiment can adequately be considered in terms of juridical analysis alone. A full survey of the scheme linking the self-governing colony of Southern Rhodesia with the protectorates of Northern Rhodesia and Nyasaland in a Federation of Rhodesia and Nyasaland would require an appraisal of the historical, geographical, economic, sociological and political contexts in which it was conceived, debated and finally shaped in legislative form. What follows must be read neither as an attempt to tell the story of federation nor as a detailed commentary upon the constitutional documents, but as a collection of comments on the more striking features of the provisions of the federal scheme.

The question of closer political association between the three Central African Territories was examined by the Bledisloe Commission in 1939, which rejected the idea of amalgamation or federation at that time.[1] In 1945 a Central African Council, under the chairmanship of the Governor of Southern Rhodesia and including representatives of the three Territories, was established as a consultative body. In 1950 the Labour Government decided that the problem of closer association should be re-examined, and in 1951 a Conference of officials of the four governments concerned, convened in London for this purpose, recommended federation as a solution.[2] The four governments endorsed the principle of federation, subject

[1] Cmd. 5949. See also Report of the Hilton Young Commission (Cmd. 3234).
[2] Cmd. 8233, p. 15.

to the entrenchment of certain safeguards for the rights of Africans in any constitution that might be adopted.[3] After further discussions, a draft federal scheme [4] was accepted by a Conference that was boycotted by Africans from the protectorates. Commissions of experts were appointed to report on matters concerning the judicial system, fiscal arrangements and the civil service.[5] The federal scheme was finally approved by an intergovernmental Conference (which African representatives from the protectorates again declined to attend) in January, 1953.[6] In the United Kingdom Parliament the scheme was opposed by the Labour and Liberal parties on the grounds that the safeguards for African rights were now unsatisfactory and that African opinion, so far as it was ascertainable, was overwhelmingly opposed to the scheme. The scheme was, however, approved by both Houses and by the Legislatures of the Territories, and by a substantial majority of the electorate at a referendum held in Southern Rhodesia. The United Kingdom Parliament then passed the Rhodesia and Nyasaland Federation Act, 1953, authorising the making of an Order in Council establishing the Federation, and providing for consequential matters; a draft Order in Council embodying the provisions of the Constitution was approved by both Houses, on a division; the Order in Council was then made. The provisions of the Constitution are to be brought into operation by stages; it is contemplated that the first elections for the Federal Assembly will be held late in 1953 and that the Assembly will meet in January, 1954.

The Order in Council falls into two parts. The fifteen covering sections provide for the establishment of the Federation,[6a] the transfer of assets and liabilities from the Territories to the Federation, various transitional arrangements, interpretation and consequential matters. There follows an Annex containing the Constitution, which consists of a preamble, ninety-nine articles and two schedules. There is a federal legislative list of items with respect to which the Federal Legislature has exclusive competence, and a concurrent legislative list. The undistributed residuum of legislative power remains vested in the Territorial Legislatures, subject to the constitutional limitations by which they are already affected. Where a valid federal law is inconsistent with the provisions of a territorial law, the latter is void to the extent of the inconsistency. Provision is made for inter-delegation of legislative powers.[7] Analysis of the contents of the legislative lists, and of

[3] See Annex II to Cmd. 8573.
[4] Cmd. 8573.
[5] Cmd. 8671, 8672, 8673.
[6] Cmd. 8753, 8754.
[6a] Certain provisions of the Constitution came into force on September 3, 1953; see Federation of Rhodesia and Nyasaland (Commencement) Order in Council, 1953, dated August 1, 1953. Sir Godfrey Huggins has been appointed Prime Minister of the Federation.
[7] Constitution, arts. 29–35; Sched. 2.

many other articles of the Constitution, including those dealing with financial arrangements and the constitution and jurisdiction of the Federal Supreme Court,[8] is precluded by considerations of space. Nor can we dwell upon points of similarity between this and other constitutional instruments; though one may observe that the rule excluding the question whether any, and if so what, advice has been tendered by the Executive Council [9] to the Governor-General from the jurisdiction of the courts (art. 39) is to be found in the Constitutions of Ceylon (section 4 (2)) and India (art. 74), and that the intergovernmental Loan Council established to regulate external borrowing (arts. 88–92) owes much to the inspiration of the Australian Loan Council. The following matters call for special notice: the preamble to the Constitution, the composition of the Federal Assembly, the African Affairs Board, the procedure for constitutional amendment, and reservation and disallowance of legislation.

The preamble. The preamble recites (i) the present constitutional status of the three Territories; (ii) that each is "the rightful home of all lawful inhabitants thereof whatever their origin"; (iii) that Southern Rhodesia shall continue to enjoy responsible government; (iv) that the protectorates shall continue, under Her Majesty's protection, "to enjoy separate Governments so long as their respective peoples so desire," those Governments remaining responsible under United Kingdom supervision for, in particular, the control of land and the political advancement of their peoples; and (v) that the federation of the Territories under a system of responsible government will have beneficent results for all their inhabitants, fostering "partnership and co-operation" between them, and will enable the Federation, when those inhabitants so desire, to advance to full membership of the Commonwealth.

During the parliamentary debates much attention was devoted to the "four fears" entertained by Africans in the protectorates: fear that the protectorates would lose their distinctive status, fear that federation was but an intermediate stage of a journey towards amalgamation in a unitary state dominated by the settlers in Southern Rhodesia, fear that they would lose their land, and fear that their prospects of future political advancement would be prejudiced. The first and fourth paragraphs of the preamble were inserted in an attempt to allay some of these fears. The Secretary of State for the Colonies will remain ultimately responsible for the administration and constitutional development of the protectorates; the Crown will retain its legislative powers under the Foreign Jurisdiction Acts. The Federal Assembly has no power to

[8] For the tenure of office by judges, see p. 505, note 4, *post*.

[9] Consisting of a Prime Minister and other Ministers appointed by the Governor-General. All must be members of the Federal Assembly and must not be at the same time members of the Legislature or Executive of the Territories (art. 37 (1)).

alter the constitutions of the protectorates, and (as will be seen) the last word on the alteration of the Federal Constitution lies with the United Kingdom. Moreover, the Secretary of State for the Colonies has given a categorical assurance [10] that neither amalgamation nor "Dominion status" will be agreed to by the United Kingdom Government unless it is satisfied that a majority of all the inhabitants in each Territory desire the change. As regards African land, the Constitution provides (art. 33) that its acquisition under federal laws shall be subject to the limitations imposed by the relevant territorial laws, that powers of compulsory acquisition conferred by federal laws shall not be exercisable for the settlement of immigrants thereon, and that the special safeguards applying to Barotseland shall continue in force.

The Federal Assembly. The Assembly is to continue in being for five years unless sooner dissolved. It is to consist of a Speaker [11] and thirty-five members. There are to be twenty-six "elected members" (fourteen from Southern Rhodesia, eight from Northern Rhodesia and four from Nyasaland), six "specially elected African members" (two from each of the three Territories) and three European members charged with special responsibilities for African interests, of whom one is to be elected in Southern Rhodesia and the others appointed by the Governors of Northern Rhodesia and Nyasaland respectively. No member of the Federal Assembly may also be a member of a Territorial Legislature. The election of the twenty-two "elected members" for Southern and Northern Rhodesia for the first Federal Assembly will take place in accordance with the local electoral laws. It may therefore be assumed that none of the twenty-two elected will be an African. The Federal Assembly may make laws for future elections of the twenty-six "elected members." Bills concerned with these matters must in certain circumstances (art. 10 (2)) obtain the support of two-thirds of the whole membership of the Assembly and be reserved for Her Majesty's pleasure before obtaining the force of law.

The African Affairs Board. The federal scheme originally proposed by the 1951 Conference of Officials provided for the inclusion in the Federal Cabinet of a Minister for African Interests, who was not to be collectively responsible with his colleagues but was to be directly responsible to the Governor-General (who, for this purpose, would be responsible to the United Kingdom Government). He was to preside over an African Affairs Board of nine members including the Secretaries for African Affairs from the three Territories. The "cuckoo Minister," as he was called by European critics in the Rhodesias, had disappeared from the draft federal scheme of 1952, and the three Secretaries had been eliminated from the African Affairs Board. In the federal scheme as finally adopted, the Board

[10] 516 H.C.Deb. 1983 (June 24, 1953).

[11] The Speaker may be elected from outside the Assembly. If at the time of his election he is a member of the Assembly he must vacate his seat (art. 16).

is no longer an extra-mural body but is brought within the four walls of the legislature as a standing committee of the Federal Assembly. These changes can be defended on several grounds—they diminish the likelihood of friction and conflict in the practical working of the Constitution, provide the Board with a forum in the Assembly, and ease the difficulty of finding suitably qualified persons to fill the various posts—and it is not clear that they will appreciably weaken the protection to be afforded to African interests. Moreover, the changes undoubtedly contributed to the acceptance of the scheme by the electorate in Southern Rhodesia. Whether these considerations ought to be regarded as decisive is disputable. Opposition to the safeguards formerly envisaged came largely from those in the Rhodesias who thought that the safeguards showed an excessive solicitude for the rights of the Africans. They have in general greeted the changes with satisfaction; African opponents of federation have shown a corresponding disquiet. These hopes and fears may prove to be unwarranted; but they are factors which have to be taken into account when weighing the propriety of imposing a constitutional system to which the majority of those directly affected appear, reasonably or unreasonably, to be opposed.

The African Affairs Board [12] will consist of the three European members of the Assembly charged with special responsibility for African interests and one African member for each of the three Territories, chosen by the specially elected African members from among themselves. The Governor-General in his personal discretion is to appoint a chairman from among the members of the Board. The chairman is to have as well as an original vote a casting vote, which is to be exercised "in such a manner as to enable further consideration to be given to the matter" (art. 68 (3)). The general functions of the Board are (a) to make such representations to the Federal Government in relation to matters within federal competence as it thinks desirable in the interests of Africans and (b) to comply with requests made by Territorial Governments for assistance in relation to the study of matters affecting Africans. In particular, it is the function of the Board to draw attention to any Bill introduced in the Federal Assembly, and any legislative instrument made under powers conferred by federal legislation, which is in their opinion a "differentiating measure." A "differentiating measure" means a "Bill or instrument by which Africans are subjected or made liable to any conditions, restrictions or disabilities disadvantageous to them to which Europeans are not also subjected or made liable," or one "which will in its practical application have such an effect" (art. 71 (2)). Copies of all proposed Bills are to be sent to the Board before being introduced in the Assembly, unless the Governor-General in his discretion certifies

[12] See Constitution, arts. 67–77.

that this procedure would in a particular case be contrary to the public interest. At any stage during the passage of a Bill, the Board may lay before the Assembly a report stating its reasons why it considers the Bill to be a differentiating measure. On the passing of a Bill by the Assembly, the Board may present to the Speaker a request that it shall be reserved by the Governor-General for Her Majesty's pleasure, accompanying its request with the reasons for its opinion that the Bill is a differentiating measure and, if the decision was not unanimous, a statement to that effect. Notwithstanding such a request, the Governor-General may in his discretion assent to the Bill if satisfied either that it is not a differentiating measure and that the reasons given by the Board are irrelevant or frivolous, or (upon representations made by the Prime Minister) that it is essential in the public interest that the Bill be brought into immediate operation; he must then forthwith send the Bill to the Secretary of State together with the Board's request and his reasons for assenting. He has no power to assent to Bills relating to electoral laws and amendments of the Constitution which he is required by the Constitution (arts. 10 (2), 97) to reserve. If the Board considers a subordinate legislative instrument to be a differentiating measure, it is to send a report to that effect to the Prime Minister, stating its reasons. The Prime Minister is to forward the report, with his comments, through the Governor-General to the Secretary of State, who may disapprove of the instrument within twelve months.

Those who look for loopholes in these safeguards will point out that the Governor-General may find it impossible to resist the Prime Minister's assertion that a Bill, although a differentiating measure, needs to be brought into immediate operation; and that once he has assented to the Bill there remains only the royal power of disallowance, a power which is unlikely ever to be exercised. Difficulties may be experienced in the interpretation of "differentiating measure" (though the opinion of the Board that a Bill is a differentiating measure would appear to be unchallengeable in the courts). It is hard to see why the words "to which Europeans are not also subjected or made liable" had to be included in the definition. If a Bill (a) will in practice impose restrictions on Africans disadvantageous to them, but (b) will in practice impose like restrictions on Europeans, it is doubtful whether it can properly be regarded as a differentiating measure although the number of Africans who will be detrimentally affected by it, and the degree of detriment suffered by them, may be substantially greater. Also, it is relevant to consider the corresponding provision (art. 28) of the Southern Rhodesian Constitution. The Governor is obliged to reserve Bills whereby natives may be subjected or made liable to any disabilities or restrictions to which Europeans are not also subjected or made liable. In the thirty years of the working of that Constitution the royal assent has never been refused to a reserved

Bill.[13] The question must be asked whether, even assuming that a wide interpretation is given to "differentiating measure" under the Federal Constitution, the United Kingdom Government will feel able to override the wishes of the Federal Assembly after having abstained so long from interference with Southern Rhodesian legislation.

Reservation and disallowance. The constitutional provision for disallowance of Federal Acts (art. 25) is a matter of common form and is of no practical significance in relation to a territory enjoying responsible government. Reservation of Bills falls into three categories : obligatory reservation under provisions of the Constitution (arts. 10 (2), 75, 97), obligatory reservation of certain classes of Bills in accordance with the royal instructions,[13a] and discretionary reservation of any Bill by the Governor-General (art. 24 (1)). Subject to the special rule for constitutional amendments (see below), the royal assent is to be given through a Secretary of State, who will in fact be the Secretary of State for Commonwealth Relations. Thus we have a curious anomaly: communications with the Federal Government lie within the responsibilities of the Commonwealth Relations Office, which is also responsible for matters concerning Southern Rhodesia; whilst responsibility for the protectorates still rests with the Colonial Office. Unless this division of responsibility proves a workable arrangement, the Federal Government may well urge a transfer of the responsibility for the protectorates to the Commonwealth Relations Office and perhaps an alteration of their constitutional status.

Constitutional amendment. The Federal Legislature has power to amend the Constitution, but a Bill passed for this purpose must have been supported by two-thirds of all the members of the Assembly at its final reading and must then be reserved. If the Legislature of a Territory passes a resolution within sixty days objecting to any provision of the Bill, or if the Bill is a differentiating measure which the Governor-General is obliged to reserve, the royal assent is to be given by Order in Council; the Order must first be laid in draft before both Houses of Parliament and will not be submitted to Her Majesty if disapproved by either House within forty days (art. 97). No Bill to amend the legislative powers of the Federal Legislature under the Constitution may be introduced in the

[13] As recently as 1951 a measure raising the qualifications for the exercise of the franchise, and so preventing any significant increase in the number of African voters, passed into law (Electoral Amendment Act, 1951 (No. 7 of 1951)). If a Bill in these terms were passed by the Federal Assembly, it would have to be reserved in accordance with art. 10 (2) of the Constitution, irrespectively of whether it was treated as a differentiating measure.

[13a] The specified classes of Bills (Royal Instructions dated August 1, 1953, cl. 2) do not call for comment. The Governor-General is also instructed (*ibid.*, cl. 3) to exercise his powers with respect to the dissolution and prorogation of Parliament and the appointment and dismissal of Ministers in accordance with the constitutional conventions obtaining in the United Kingdom.

Assembly for ten years unless it has been laid in draft before the Territorial Legislatures and none of them has objected to its introduction (art. 98). This restriction on the power of constitutional amendment applies also to the amendment of arts. 98 and 99. The latter article provides for a review of the Constitution after not less than seven or more than nine years by a conference consisting of delegations from the United Kingdom, Federal and Territorial Governments. It is apparently contemplated that the Constitution will not be recast by the United Kingdom Parliament after such a conference except with the agreement of all the Governments concerned.[14] The covering sections of the Constitution Order in Council can be altered only by Act of Parliament.[15]

These safeguards, and the others already discussed, may be sufficient to prevent the Federal Assembly from effectively reducing the political rights of Africans, should it wish to take such a step. Pessimists will not feel re-assured, however, when they view the safeguards against the background of the probable composition of the Federal Assembly. Of the 35 members of the Assembly, only six must be Africans. At present it seems unlikely that other Africans will be elected to the first Assembly; the African element will certainly be less than one-third of the total membership. That the electoral laws to be enacted by the Federal Legislature should offer a real possibility of an early increase in African representation is clearly a matter of the first importance. The federal experiment will be a failure if the weaker but more numerous racial group have to call for United Kingdom intervention to defend their interests or promote their political advancement. The swift emergence of a federal political party devoted to combating the ideal of partnership that is enshrined in the preamble to the Constitution is a disturbing phenomenon. No less discouraging has been the outcome of the September Conference held in London to revise the Northern Rhodesian Constitution. On the other hand, two events have aroused hopes for the future: the insertion of a provision in the Constitution (art. 40 (2)) that not race but merit alone shall determine eligibility for the federal public service,[16] and the decision to establish a multi-racial university in Salisbury. The degree in which the spirit that has informed these decisions pervades federal politics will be the measure of the success of this unique enterprise in responsible government.

S. A. de Smith.

[14] See speech of the Parliamentary Under-Secretary of State for Commonwealth Relations: 515 H.C.Deb. 505–7 (May 6, 1953).

[15] See Rhodesia and Nyasaland Federation Act, 1953, s. 1 (2).

[16] Suggestions that a general declaration of human rights should be embodied in the Constitution and that a Federal Human Rights Commission should be established were not followed

REPORTS OF COMMITTEES

Report of the Goddard Committee on the Law of Civil Liability for Damage done by Animals

[Cmd. 8746 : January, 1953]

This is the Report of a strong Committee presided over by Lord Goddard C.J. which was set up at the end of 1951 to consider a branch of the law which stands in urgent need of revision. In view of what they describe in the Report as the " considerable difficulty and complexity " of the subject, the Committee have on the whole done a good piece of work. Although some of their recommendations fall short of what may be regarded as desirable, and others seem to go too far, and although the Report is brief and contains some rather mysterious passages, we can express at the outset of this review our gratitude that the Committee have felt able to recommend some long-needed changes.

The Scienter Rule and the Rule of Strict Liability

At present the law of civil liability for damage done by animals takes the form of what is known as the Scienter Rule applying to animals *mansuetae naturae*, and a rule of strict liability for animals *ferae naturae*. The Report begins with an attack upon this ancient distinction, which, it is said, " has made the law intricate and complicated." The Committee propose the abolition of the distinction, in place of which they would substitute liability for the acts of every class of animal based upon negligence. They see no reason why the law concerning damage caused by animals should be different from the law relating to damage caused by chattels. In their view, this " need not result in any practical diminution of an owner's responsibility for a dangerous animal, because the degree of care which must be exercised in the keeping of an animal will depend upon its nature and will obviously be far higher in the case of a tiger than a dog."

Despite this assurance, Dr. Goodhart has felt obliged to differ from the rest of the Committee on this point. In his " Reservations on Wild Animals," he argues that the owner of a wild animal such as a tiger should be held liable in all circumstances if the animal escapes and does damage, even though there is no negligence on the owner's part. He does not regard the present law as being in need of revision, especially since in the last sixty years only two cases concerning wild animals have come before the courts.

While it is obvious that there is a certain rough logic about the rule of strict liability for wild animals, if the cases are as rare as

Dr. Goodhart suggests, it can equally well be said to be of little importance to retain the law as it is, and if the law relating to damage caused by animals *mansuetae naturae* is to be placed on the fairer basis of negligence, there is much to be said for bringing the law relating to animals *ferae naturae* into line, and thus doing away with the two classes altogether. The Committee are to be complimented for having made this recommendation.

Cattle Trespass

Next the Committee turn their attention to the action of cattle trespass. Here it seems their courage failed them. Apparently at one stage in their deliberations a majority of the Committee were in favour of recommending the abolition of this ancient action, leaving liability for damage done by trespassing cattle to be dealt with under the general law of negligence. However, to the disappointment of Professor Glanville Williams, expressed in a Note to the Report, they eventually came to the conclusion that the action should remain. In this they were strongly influenced by the evidence of the National Farmers' Union, and by the fact that claims based on cattle trespass are usually for small sums and are amicably settled between the farmers and landowners concerned. They feared that "to introduce the necessity for an allegation of negligence would promote rather than discourage litigation." The Committee err on the side of caution in this matter.

Yet they do make one positive suggestion with regard to this type of liability, and that is, that it should be limited to the damage done to the land and to crops, and should not extend to damage to persons on the land, to chattels or to other animals. The Committee seem to think this is the extent of the present law. In view of the fact that Professor Glanville Williams in his book on *Liability for Animals* contends there is a wider liability, and that this can be supported from the case law, the Committee's statement is rather surprising. Their recommendation that the liability should be limited to damage done to land or crops is a conservative one, and provokes the dissent of Dr. Goodhart, who points out that the most likely case, *viz.*, damage done to other animals, as in *Lee* v. *Riley* (1865) 18 C.B.(N.S.) 722 and *Ellis* v. *Loftus Iron Co.* (1874) L.R. 10 C.P. 10, will, if this recommendation be accepted, fall to be dealt with on the basis of negligence —one wonders with what result. Moreover, the case of the animal which trespasses carrying foot and mouth disease and infecting a neighbouring herd would not be covered by cattle trespass. Dr. Goodhart's view is that there is no reason to alter the present law of cattle trespass, while Professor Glanville Williams regards it as unnecessary to retain it at all. In assuming a position midway between them, the Committee have satisfied neither of the learned

Professors, and we venture to predict that their recommendation will not command general support.

Animals on the Highway

By far the most urgent problem which the Committee were called upon to tackle was the law concerning liability for damage done by animals on the highway. It is now clear that the common law imposes no duty on the owner or occupier of land adjoining the highway to prevent animals from escaping on to the highway, although there may be liability for negligence where the owner of the animals actually brings them on to the highway himself. The House of Lords in *Searle* v. *Wallbank* [1947] A.C. 341 emphatically reaffirmed the position, yet the Committee rightly regard the situation as remarkable. One reason for the state of the law is that so much land remains unfenced, and to impose liability on the occupier for the escape of his animals would mean that heavy expenditure would have to be incurred in fencing the land securely. But against this it may be urged that such liability could be insured against, and where the land is already enclosed, there is much to be said for an obligation to fence securely. It is gratifying to discover that the Committee have felt able to reach the conclusion that "on any view we think it desirable that the rule should be modified to meet modern conditions of traffic where a road runs through enclosed country." They propose that liability in such circumstances should be based on negligence. Three points should be noted about this proposal: (1) It is confined to damage caused by escaping cattle or poultry, which terms are used in their technical sense; (2) it is to apply irrespective of whether the animal's behaviour is in accordance with its ordinary nature or not; (3) the liability will not extend to injuries suffered on highways running over waste or unenclosed land or commons. So hedged about, if we dare use the phrase in this context, the Committee's proposal seems eminently reasonable.

Onus of Proof of Negligence

One of the difficulties about the Scienter Rule has always been the difficulty facing the plaintiff of proving *scienter*. In order to avoid similar trouble with regard to the liability for negligence which it is proposed to substitute for the Scienter Rule, the Committee consider that the onus of proof of the absence of negligence should be placed on the defendant, rather than the other way round. If the strict liability relating to dangerous animals is to be modified, along with the Scienter Rule, in favour of liability based on negligence, it is perhaps natural that the law relating to proof of negligence should be formulated in the way most favourable to the plaintiff. This proposal is apparently confined to cases where it is sought to make an owner or keeper of an animal liable in

negligence and does not extend to cases where occupiers of land are proceeded against for damage caused either by the escape of animals on to the highway, or on to neighbouring land which damage is not covered by cattle trespass, *i.e.*, damage to persons or chattels or other animals. The result may well be that it will be easier to sue the farmer as owner or keeper of the animal than as occupier of the land. The Report does not advert to this possibility, and we are left in the dark whether or not the Committee contemplated and intended it.

Protection against Trespassing Dogs

The Committee received strong representations concerning the extensive damage caused by dogs chasing cattle and poultry and more especially sheep. They came to the conclusion that the powers of farmers or occupiers of land to deal with such dogs should be increased, and that there should be a right to shoot a dog found trespassing in the vicinity of cattle or poultry provided that the farmer or occupier reasonably believed that damage to his animals had been or might be caused. This right would only apply while the dog was on the farmer's own land and provided that he gave notice of the shooting to the nearest police station within forty-eight hours.

It is suggested that this proposal goes too far in the direction of giving the farmer complete liberty to shoot dogs coming on his land. The limitation of the proposed right to shoot to cases where the dog is actually on the farmer's land cannot be regarded as a serious limitation of the right, particularly in view of the Note by Professor Glanville Williams, which urges that this is an " undue restriction " of the liberty to shoot, which should apply equally where the dog is on a neighbour's land at the time of the shooting. Nor can the obligation to report to the police be regarded as a safeguard. It is true that the criminal law makes it an offence unlawfully and maliciously to kill, maim or wound any dog or other animal, and that the criminal courts have recently defined very exactly the extent of the right of a farmer to shoot a dog in defence of his cattle or sheep. But in the event of the present proposals being adopted, the Committee recognise that the criminal law would probably be brought into line. So that a farmer would be under no civil or criminal liability if he shot a dog after it had attacked or worried his livestock, whether or not other means of preventing a renewal of the attack were available. In fact he could dispense summary justice to the dog and claim immunity from liability for the execution. While one may have the greatest sympathy with farmers in their losses through sheep-worrying, etc., there are surely limits to the concessions which can be made in their direction. We cannot abdicate the process of law in favour of the farmers.

Distress Damage Feasant

The last matter to which the Committee draw attention in their Report is the impossible state of the law concerning distress damage feasant. This right, says the Committee, is " subject to many technicalities and its value in modern times is much diminished, if for no other reason than because the impounder has no right of selling the animal impounded." They recommend that the remedy of distress damage feasant should be abolished and a right substituted which would be more in accord with modern conditions. Their proposals under this head seem to represent a marked improvement on the existing law.

In conclusion, no better authority can be cited than Professor Glanville Williams for the opinion, expressed at the end of his Note to the Report, and shared by the present reviewer, that " the Report as it stands would, if implemented, greatly improve the law of liability for animals." Some of the recommendations will have to be very closely scrutinised before they can be accepted, and others may seem unacceptable. The path of the law reformer is never likely to be smooth, but it can be made easier by a courageous Report from a sympathetic Committee. This Committee cannot be accused of lacking courage, except in regard to cattle trespass, nor sympathy, except perhaps with the dog and its owner.

J. E. Hall Williams.

NOTES OF CASES

Tenure of Office by Colonial Judges

In any country the independence of the Judiciary is preserved more securely by constitutional practice than by rules of strict law. The good sense of Ministers, legislators and the judges themselves, professional tradition and the force of public opinion are surer safeguards than any formal legal guarantee. Yet the existence of formal guarantees moulds and conditions these habits of thought and conduct, even where the guarantees are less firm than is generally believed. Since 1700 the English superior judges have been removable by the Crown either for misbehaviour or upon an address presented by both Houses of Parliament praying for their removal. A judge may lawfully be removed upon an address inspired by trivial or irrelevant complaints against him; but in the light of the historical background of the Act of Settlement it is inconceivable that an address would be presented except where a judge had been guilty of grave misconduct. That superior judges hold office during good behaviour has come to be regarded as a constitutional principle of so high a sanctity that many were shocked to discover from the decision of Lord Goddard C.J. in *Terrell* v. *Secretary of State for the Colonies* [1953] 3 W.L.R. 331, that a superior judge in a colony was removable at the pleasure of the Crown. Discussion of the decision in the Press has centred around the question whether the general law should be changed to provide for the appointment of colonial judges during good behaviour. There are, however, passages in Lord Goddard's judgment which touch upon other controversial points that are of great interest.

The facts of the case were unusual and perhaps unique. In 1930 the Secretary of State for the Colonies offered T. the appointment of a Judge of the Supreme Court of the Straits Settlements. The offer was contained in two letters, the second of which stated that T.'s compulsory retiring age would be 62. T. accepted the appointment on these terms and was appointed to the office by letters patent issued under the seal of the colony. In 1942, while T. was in Australia on leave, Malaya was occupied by the Japanese. T., who was then aged 60 and a Judge of Appeal, was told that no other post in the Colonial Legal Service was available for him to occupy during the period until his normal retiring age. Having declined to ask leave to retire, he was retired against his wishes. As a result, his pension was less than it would otherwise have been. The question whether he was liable to have his appointment thus terminated was submitted to arbitration. The arbitrator stated his award, which was unfavourable to T.'s contentions, in the form

of a Special Case. The main points of law to be decided by the court were whether superior judges in Malaya held office during pleasure and whether, by virtue of the letters addressed to T. in 1930, the Crown was bound, contractually or otherwise, by a legally enforceable duty not to dismiss T. until he had attained the age of 62.

Lord Goddard C.J. upheld the arbitrator's award. Section 3 of the Act of Settlement, relating to the tenure of a judge, did not extend to colonies. The procedure of removal upon address of both Houses of the Imperial Parliament was wholly inapplicable to colonial judges. The effect of the relevant imperial and local legislation was that judges in the Straits Settlements were to be appointed by the Crown by letters patent under the public seal of the colony to be issued in pursuance of a royal warrant. Prerogative instruments issued to the Governor had authorised and directed him in the name of and on behalf of His Majesty to appoint judges by letters patent to hold office during His Majesty's pleasure. Even if the Secretary of State had purported by written assurances to fetter the power of the Crown to dismiss at pleasure, he would have had no authority to do so : " Once it is established that the Crown has power to dismiss at pleasure, that right cannot be taken away by any contractual arrangement made by an executive officer or department of State." This rule could not be regarded as a principle of public policy limited to civil servants and military officers : " Once a doctrine has become a rule of law . . . the court is bound to apply it without inquiring into its origin." In any event, were a colonial judge to exercise his office in a brutal, tyrannical or incompetent manner the consequences might be at least as detrimental as the action of a civil servant or military officer. The Secretary of State might have advised the issue to the Governor of prerogative instruments empowering the Governor to appoint a judge by letters patent to hold office during good behaviour; he could not achieve the same end by correspondence with an appointee. Moreover, a judge holds office not by contract but by royal appointment. The correspondence in question did not form part of a contract giving T. an enforceable right to remain in office until the age of compulsory retirement, but merely informed him of the general conditions applicable to the office. Dicta in *Reilly* v. *R.* [1934] A.C. 176 (P.C.), on which the claimant had relied, were not relevant to the facts of the present case. Nor did any question of estoppel arise here; further, an estoppel could not be used as founding a cause of action, yet the claimant was in effect claiming a declaration that he had been wrongly removed and was therefore entitled to a higher pension.[1]

[1] The possibility that T.'s office had fallen into abeyance, or that, assuming that there was a contract between T. and the Crown, the contract had been frustrated, was not discussed in the judgment.

One who holds office (a) during pleasure, (b) subject to compulsory retirement at a fixed age, is not thereby protected against removal before that age: the terms of his appointment are not inconsistent with one another. The case could have been decided against T. on that ground alone. But the decision goes further, for Lord Goddard was prepared to hold that even had the Secretary of State purported to assure T. that he would continue in office for a fixed term such an assurance would not have bound the Crown. Where an officer, as in the present case, is appointed by a formal prerogative instrument issued in the name of the Crown which expressly provides for tenure during pleasure, the rule that the terms of appointment cannot be varied by assurances given *aliunde* by a superior Crown servant is a reasonable one, because the officer ought to know that the provisions of the formal instrument must prevail. But what of the case of an ordinary civil servant who may be appointed by a letter which tells him that he is to hold office for a fixed term and/or is to be dismissible only "for cause"? Why should not such assurances, if given by a responsible Minister, bind the Crown? In *Reilly* v. *R.* Lord Atkin said that if the terms of appointment definitely prescribed a term and expressly provided for a power to determine "for cause," the implied power to dismiss at pleasure was excluded. Lord Goddard was apparently ready to accept this proposition to the extent of holding that where an officer of the Crown was appointed subject to dismissal for cause he would have a right of action if dismissed without cause; though inasmuch as he denied that a judge held office under a contract it is not wholly clear that he intended to apply it to the case of a judge. On the other hand, earlier in his judgment he had emphatically rejected in general terms an argument that appointment for a fixed term excluded the implied power to dismiss at pleasure (but *cf.* his subsequent observation at the foot of p. 342). In the result, not only the scope and authority of Lord Atkin's dictum in *Reilly* v. *R.* but also its exact interpretation by Lord Goddard in *Terrell's Case* remain doubtful. It is suggested that it would be consistent with justice, if not with all the decided cases, for Lord Atkin's dictum to be read disjunctively, and for a civil servant to have a right of action for wrongful dismissal if appointed *either* for a fixed term *or* subject to dismissal for cause.

In *Reilly* v. *R.* Lord Atkin also said that a power to determine a contract at will was not inconsistent with the existence of a contract until so determined. In *Terrell's Case* Lord Goddard adopted and amplified this proposition by observing that a Crown servant dismissible at will may on dismissal sue to recover his salary for the time that he has served. This important dictum lends strong support to the arguments of those who have criticised

the judgment in *Lucas* v. *Lucas* [1943] P. 68 in so far as it denied a Crown servant any right to his salary.[2]

The finding that section 3 of the Act of Settlement was not to be interpreted as applying to colonial judges becomes even more convincing if it is recalled that in 1700, and indeed for more than a hundred years after, persons exercising judicial functions in the colonies were often unqualified in law and usually incompetent. The mischief that the section sought to remedy was the subservience of English superior judges to the Crown; it was not designed to create the mischief of entrenching the notoriously inept. The relevant provisions of the Acts of 1873, 1876 and 1925, which supersede the formula of 1700, apply in terms only to the superior judges of the United Kingdom.[3] It is thought that today all judges who are members of the Colonial Legal Service hold office, under the terms of their instruments of appointment, during pleasure. The position in Southern Rhodesia and Malta is exceptional: the constitutions of those colonies provide that the superior judges (who are not members of the Colonial Legal Service) are subject to removal on address of the local legislatures on grounds of proved misbehaviour or incapacity.[4] Every colonial judge, however, is removable by the Governor in Council under the provisions of section 2 of the Colonial Leave of Absence Act, 1782, for absence without leave, neglect of duty or misbehaviour; he must be given an opportunity of being heard in his own defence, and if aggrieved by the decision may appeal to Her Majesty in Council.[5] A judge holding office during pleasure may alternatively be suspended from office by the Governor; the case would then probably be referred to the Judicial Committee of the Privy Council before a decision was taken to remove the judge. Also, any colonial legislature may petition the Queen for the removal of a judge; again, the case would be referred to the Judicial Committee.[6]

Nevertheless, it seems that a judge holding office during pleasure may still in strict law be dismissed by Her Majesty without having

[2] See Logan, 61 L.Q.R. 240; Williams, *Crown Proceedings*, 71–2; Griffith and Street, *Principles of Administrative Law*, 260.

[3] Supreme Court of Judicature Act, 1873, s. 9 (repealed); Appellate Jurisdiction Act, 1876, s. 6; Supreme Court of Judicature (Consolidation) Act, 1925, s. 12 (1).

[4] Southern Rhodesia Constitution Letters Patent, 1923, art. 38 (2); Malta (Constitution) Letters Patent, 1947, art. 45. Under art. 47 (6) of the Annex to the Federation of Rhodesia and Nyasaland (Constitution) Order in Council, 1953, the Governor-General may remove the Federal Chief Justice or a Federal Justice on an address from the Federal Assembly praying for his removal on the grounds of misbehaviour or infirmity of mind or body.

[5] *Willis* v. *Gipps* (1846) 5 Moo.P.C. 379, cited by Lord Goddard as illustrating the application to judges of the common-law doctrine that the Crown's right to dismiss at pleasure cannot be fettered by contractual arrangements made by other Crown servants, was in fact a decision given on the interpretation of the 1782 Act. For an examination of the present application of the Act to judges in the State of Victoria, see Cowen and Derham in (1953) 26 Austr.L.J. 462.

[6] See generally, Alpheus Todd, *On Parliamentary Government in England*, 2nd ed., 1889, ii, 880–909; Memorandum of the Lords of the Council on the Removal of Colonial Judges (1870), 6 Moo.P.C.(N.S.), Appendix.

the advantage of these constitutional safeguards. Constitutional practice diminishes but does not eliminate the possibility of arbitrary removal. Public policy requires that every professional full-time judge should be guaranteed by law a reasonable measure of security of tenure. As a first step, the law might well be amended to provide:

(*a*) that, subject in appropriate cases to the fixing of a compulsory retiring age, superior judges in the dependent territories of the Commonwealth shall be removable only for misbehaviour or incapacity (these terms would include the incompetent as well as the brutal and tyrannical);

(*b*) that every judge so removed shall have a right of appeal to the Judicial Committee of the Privy Council;

(*c*) that, in the case of specified territories that have reached an advanced stage of responsible government, the initiative in securing removal shall be confined to the local legislatures.

S. A. de Smith.

Statutory Tribunals and the Action for a Declaration

To herald a decision of the Court of Appeal on the interpretation of a statutory instrument as a leading case may be rash; it can too easily be banished by artificial distinction to the wilderness of cases that turn upon their own particular facts. Nevertheless, *Barnard* v. *National Dock Labour Board* [1953] 2 Q.B. 18, may be said to hold a stronger claim to eminence than any case in administrative law since *Local Government Board* v. *Arlidge*. The broad sweep of the judgments, the discussion of fundamental principle and the *ratio decidendi* itself, which, pitched at its highest, provides authority for an expansion of the scope of judicial review of administrative action, all suggest that the case may achieve greatness without having that distinction thrust upon it.

The National Dock Labour Board, a body created by the Dock Workers (Regulation of Employment) Order, 1947, had validly delegated disciplinary functions vested in it by the Order to local boards, consisting of equal numbers of representatives of dock workers and employers. The London Dock Board, a local board, delegated certain of these functions to the port manager. The port manager suspended the plaintiffs (who were registered dock workers) from work and pay for refusal to carry out orders. The plaintiffs appealed unsuccessfully to the appeal tribunal that had been set up under the 1947 Order with power to modify but not to increase penalties. They then instituted proceedings against the N.D.L.B. and the employers, claiming declarations that they had been wrongfully suspended and that they were entitled to wages for the period of their suspension. As a result of discovery of documents by the N.D.L.B. the plaintiffs learned for the first time that they

had been suspended not by the local board but by the port manager. The issues before the Court of Appeal finally resolved themselves into two questions [1] : whether the local board had power to delegate disciplinary functions to the port manager; and whether, if it had acted *ultra vires*, the court had power to grant a declaration in favour of the plaintiffs and ought to exercise such a power in the present case.

The court found for the plaintiffs on both issues. All the Lords Justices held that the disciplinary functions of the local board were judicial (or quasi-judicial) and not merely administrative.[2] Romer L.J. held, further, that judicial functions could not, by their very nature, be delegated. The better view, it is respectfully suggested, is that of Denning L.J.: no judicial tribunal can delegate its functions unless enabled to do so expressly or by necessary implication. Here there was no such necessary implication; on the contrary, one of the objects of the scheme established by the 1947 Order was to replace the former system under which disciplinary functions had been exercised by port managers. Again, as Romer L.J. pointed out, the local board, itself a delegate, was affected by the maxim *delegatus non potest delegare*. Singleton and Romer L.JJ. also said that it would be no answer for the local board to show that the burden of the work involved would have been too heavy for them. One would think, however, that the question of the practicability of the scheme would be a material factor in determining whether an implied power of delegation was to be read into the Order.

The question whether a declaration could and should be granted presented greater difficulties. There was authority to support the proposition that a declaration may be granted, as an alternative remedy to certiorari, against a statutory tribunal which has acted without jurisdiction. Certiorari would have been of no use to the plaintiffs in the present case, for there is no discovery in certiorari proceedings and the plaintiffs would not have found out that their suspension had been effected by an illegal procedure. But the declaratory order belongs to the stable of unruly horses. We know that it is a discretionary remedy, that its limits are ill-defined, but that its scope is wider than that of certiorari. It has never been

[1] For the proceedings in the court of first instance, see 68 T.L.R.(Pt. 2) 309; [1952] 2 All E.R. 424.

[2] In *R.* v. *Metropolitan Police Commissioner, ex p. Parker* [1953] 1 W.L.R. 1150, the revocation of a hackney carriage driver's licence on the grounds that the licensee was not a fit person to hold a licence was held, on the construction of the relevant Order, to be a purely administrative function. A comparison of this decision with the decision in the *Barnard Case* serves mainly to illustrate the flexibility of the terms "judicial" and "administrative," but the observation of Lord Goddard C.J. (at 1155) that "where a person . . . is exercising disciplinary powers it is most undesirable . . . that he should be fettered by threats of orders of certiorari and so forth . . ." suggests a difference of approach from that adopted by the Court of Appeal in the *Barnard Case*. The decision of the Divisional Court is criticised in 117 J.P.J. 541, 589.

held that a declaratory order can be made where a statutory tribunal has made an error of law which does not go to its jurisdiction and is not incorporated in a "speaking order." To make an order in such a case might well open the floodgates to a swarm of actions impugning the decisions of statutory tribunals in circumstances where Parliament could be taken to have intended that there should be no appeal to the courts. In the present case the plaintiffs had appealed unsuccessfully to the appeal tribunal against the suspension order. Presumably the appeal tribunal had jurisdiction to allow the appeal; surely, then, it had jurisdiction to dismiss it? Were not the plaintiffs complaining of an error of law by a statutory body that did not go to jurisdiction?

All the judgments show an awareness of the important issues of public policy involved. Singleton L.J. said (at 35):

> "It cannot be right to say that whenever a tribunal such as the local board or the appeal tribunal makes a mistake the court can grant a declaration such as is asked for in the present case; that would lead to endless confusion. The courts have, however, power to grant a declaration or an injunction in certain cases to prevent an injustice."

To him the question in the present case was, if not one of jurisdiction, closely akin to it. The discretion of the court in granting relief was to be exercised sparingly; in this case relief could properly be granted. Romer L.J. took the view that "prima facie it is the right of everyone in this country who is involved in a legal dispute to have that dispute determined by Her Majesty's courts"; here the right had not been expressly taken away; the appeal tribunal had not been invested with the exclusive power to determine the question of law (*i.e.*, the legality of the method of suspension) on which its jurisdiction was founded, and had in any event failed to determine that question, because it had not been brought to its notice. Denning L.J. held that inasmuch as the port manager's suspension order was a nullity, it followed that the appeal tribunal's order was a nullity also. Of the general power of the courts to review decisions of statutory tribunals, he said (at 41):

> "I am sure that in the vast majority of cases the courts will not seek to interfere . . . ; but that there is power to do so, not only by certiorari, but also by way of declaration, I do not doubt. I know of no limit to the power of the court to grant a declaration except such limit as it may in its discretion impose upon itself. . . ."

Certiorari was hedged around by limitations and might not be available. If then the court could not intervene by declaration and injunction "it would mean that the tribunal could disregard the law, which is a thing no one can do in this country." His Lordship thus re-states and expands views he had expressed in *Lee* v. *Showmen's Guild of Great Britain* [1952] 2 Q.B. 329, at 346, and earlier in the Hamlyn Lectures (*Freedom under the Law*, 126).

Where the *ratio decidendi* of a case can be formulated at several levels of generality the judgments are perhaps best left to speak for themselves. Does *Barnard's Case* provide firm authority for the proposition that a court has power to award a declaration to one aggrieved by the decision of a statutory tribunal containing an error of law that is neither jurisdictional nor embodied in a speaking order? Probably not; yet the case could be so interpreted. The action for a declaration in the Queen's Bench Division is now likely to become a more popular method of challenging decisions of statutory tribunals. But until its ambit is more clearly settled, it cannot be expected to supplant the application for certiorari in the divisional court. To proceed by way of action for a declaration is indeed to incur a considerable risk of losing a case by the choice of an inappropriate remedy. This state of affairs lends further emphasis to the desirability of a thorough-going re-examination and revision of the present methods of proceeding against statutory bodies in the courts.

S. A. de Smith.

Crown Privilege and the Interests of Justice

In view of the conclusion reached by the House of Lords in *Duncan* v. *Cammell Laird & Co.* [1942] A.C. 686, the Court of Appeal's decision in *Ellis* v. *Home Office* [1953] 3 W.L.R. 105 was as inevitable as was the fact that sooner or later a situation would arise (as in this case) justifying the court's reiteration of the trial judge's "uneasy feeling that justice may not have been done because the material before me was not complete, and something more than an uneasy feeling that, whether justice has been done or not, it certainly will not appear to have been done." The vital question raised by the plaintiff, who had been attacked while on remand in prison by H., a mentally defective fellow prisoner, was whether the prison authorities knew or ought to have known that H. was a man of violent propensities. To establish such knowledge, the plaintiff claimed the discovery of the medical officers' reports upon H., the police reports of their investigations made at the time of the assault and, in particular, a deposition made at the time by another prisoner. But Crown privilege was successfully claimed for all these documents and it would be no exaggeration to say, with Wigmore, 8 *Evidence*, s. 2378, that the effect was "practically to accord to [the executive] an exoneration from liability by refusing means of proof." In the circumstances, it is not surprising that, as in *Duncan's Case*, the burden of what was said by the court was the need for careful scrutiny by the executive. It has been remarked (14 M.L.R. 123) that "it is becoming a common judicial practice to suggest to the executive how it should exercise its discretions," but Dr. Goodhart has noted (58 L.Q.R.

437) that "this advice is of a hortatory nature," while Dean Pound adds (56 Harv.L.R. 813) that "lawyers . . . may doubt whether this exhortation will achieve much."

Notwithstanding the uneasiness caused by this latest instance of the rule which makes conclusive a ministerial objection taken in the proper form, no member of the court suggested that the rule should be otherwise. And, indeed, although the substitution of the court for the Minister might ensure a greater appearance of justice, it would not necessarily ensure justice. In the first place, there is no merit in production to the court coupled with a refusal to produce to the party. In *The People* (*Att.-Gen.*) v. *White* [1947] Ir.R. 247, a police superintendent produced to the court, but claimed privilege to withold from the defence, a register of firearms issued to the police, by which the accused, on a capital charge of shooting a police officer, sought to show that the deceased had been shot by a weapon of the same calibre as that issued to the police. The claim of privilege was upheld and the accused convicted. Moreover, there may be positive danger in the court's seeing a document (to decide the question of privilege) if it ultimately withholds the document from the party. Although it is frequently assumed that documents withheld are to the advantage of the party claiming their production, they may in fact be to his disadvantage, in which case a judge would be in a difficult position were he to peruse the document and have to decide to withhold it from the party, for it might well be that he would find it impossible to put it out of his mind, so that the party would be prejudiced by a document to which he had no access.

In *Ellis* v. *Home Office* (*supra*), the judgments in the Court of Appeal contain two proposals for changes in procedure. Whereas Viscount Simon L.C. in *Duncan's Case* made it clear that a claim for privilege may arise not only from a scrutiny of the document but also from the fact that it is one of a class which as a class must be withheld from production, Singleton L.J. considered that "the danger is the wide claim of privilege without consideration of individual documents" (p. 112) and he urged that "each individual document should be examined before a claim of privilege is made" (p. 113)—a proposal supported by Jenkins L.J. (p. 114). Point was added to this suggestion by the Crown's production in the Court of Appeal (after adjournment) of a document withheld at the trial. This prompted Jenkins L.J. to make the second proposal for procedural reform, *viz.*, that "there should be someone on the spot readily available—whether counsel or solicitor on the government side or an official from the department concerned—invested with authority . . . to waive the claim of privilege." Although this would apply only "in the case of ordinary documents," it appears to be incompatible with the earlier suggestion that the Minister should scrutinise each document before claiming privilege, for, if that were done, it would be difficult to imagine how counsel,

solicitor or official could unsay what the Minister has said on oath. There is no reason, however, why such a practice should not prevail where privilege is claimed, as now, for a class of documents. As, however, the House of Lords reviewed this matter in 1942 and the legislature accepted their conclusions in 1947 (preserving the rule in *Duncan's Case* by the proviso to section 28 of the Crown Proceedings Act, 1947), neither complaint nor exhortation is likely to effect any immediate change in the law.

J. A. Coutts.

Cruelty, Desertion and Just Cause in Matrimonial Suits

Several recent matrimonial cases have called for an inquiry into the extent, and even the existence, of "just cause" in the sense of conduct that, while not amounting to constructive desertion, enables the other spouse to leave home without thereby being in desertion. A cleavage of judicial opinion on the subject is apparent.

Perhaps the beginnings of the current judicial investigations may be found in the decision of the Court of Appeal of Singleton, Denning and Hodson L.JJ., in *Bartholomew* v. *Bartholomew* [1] that a wife's dirtiness in the home and her person does not constitute constructive desertion. In one sense the decision merely emphasised the absence in English law of any remedy for the husband of a lazy or sluttish wife,[2] but both Singleton and Denning L.JJ. declared expressly that, since the husband who had left the home could not establish constructive desertion in the wife, he was himself the deserter. The possibility that the wife's conduct might constitute just cause for the husband leaving her does not appear to have been considered. Shortly afterwards, in *Pike* v. *Pike*,[3] the same Court of Appeal held that, in the words of Hodson L.J.[4]: "When the case sought to be made is in the nature of a case of cruelty, it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty." Here the wife appeared throughout most of her married life to have preferred living with her mother to living with her husband, and had succeeded at first instance in obtaining a divorce on grounds of constructive desertion by reason of her husband's threats and violence which were, however, held not to constitute legal cruelty. This decision was reversed on appeal. Hodson and Denning L.JJ. stressed also the fact that the most important of the alleged acts of violence by the husband had never been pleaded by the wife. Denning L.J., however, declared the existence of the half-way position when he said: "There may be conduct different from

[1] [1952] 2 All E.R. 1035.
[2] Even when she neglects the children: *Kaslefsky* v. *Kaslefsky* [1951] P. 38 and *Bartholomew* v. *Bartholomew*, *supra*.
[3] [1953] 1 All E.R. 232.
[4] *Ibid.* at p. 235.

cruelty—not less than it—which gives her reasonable cause for staying away . . . , but even such conduct does not automatically make him guilty of desertion. To make the husband guilty of constructive desertion, there must be an intention by him to bring the matrimonial consortium to an end." *Edwards* v. *Edwards*,[5] a previous decision of the Court of Appeal, appears not to have been cited to or considered by the court.

It was this state of the authorities that faced Davies J. when in *Dixon* v. *Dixon*[6] he was asked, and refused, to strike out as *res judicata* a defence to a charge of desertion, based on conduct which had, in previous proceedings, been held not to constitute cruelty. The *ratio decidendi* of *Dixon* v. *Dixon* appears (the headnote in the report of the W.L.R. notwithstanding), to be simply that such a summary course as striking out the pleading was inappropriate in the circumstances, particularly as the precise findings on cruelty in the previous proceedings were not clear. But in reaching his decision Davies J. considered at length the Court of Appeal decisions in *Pike* v. *Pike* and *Edwards* v. *Edwards*, in which *Barker* v. *Barker*,[7] a decision of Hodson J. (as he then was), was explained.

Soon after *Dixon* v. *Dixon* the question was again brought neatly before the Court of Appeal, consisting on this occasion of Denning and Hodson L.JJ. and Lloyd-Jacob J. in *Timmins* v. *Timmins*.[8] Here the husband brought a petition for restitution of conjugal rights against his wife, who had left him after suffering a mental breakdown. She in reply petitioned for a divorce on the ground of his cruelty. At first instance Wallington J. found that the husband was inclined to be domineering and overbearing, had a hasty temper and habitually expressed himself in rather rapid unmeasured terms, but that no legal cruelty could be proved against him. This being so, Wallington J. considered himself bound by the authorities to grant him an order for restitution of conjugal rights, although he expressed anxiety that, if the wife obeyed the order, she might as a result of the husband's treatment suffer another mental breakdown. On appeal only Hodson L.J. was prepared to follow the logic of *Pike* v. *Pike* to the extent of agreeing with such a decision and declared : " Cruelty does not, so to speak, shade off into just cause." But he appears to have agreed with the majority of the court that there is a field of just cause, although in his view the husband's conduct in the present case was not sufficiently grave and weighty to fall within it. Both Denning L.J. and Lloyd-Jacob J., however, considered that the husband's conduct was a sufficiently grave and weighty matter to constitute just cause. Both declined to upset Willmer J.'s findings that cruelty by the husband had not been established,

[5] [1950] P. 8.
[6] [1953] P. 103 and [1953] 2 W.L.R. 748.
[7] [1949] P. 219.
[8] [1953] 2 All E.R. 187.

although Lloyd-Jacob J. thought that "for the husband to behave in an overbearing, domineering and dictatorial manner when once he has appreciated the consequences of such behaviour to her state of mind would . . . be . . . a wickedly cruel matrimonial offence," and Denning L.J. was "a little surprised that the judge acquitted the husband of cruelty." Both Denning and Hodson L.JJ. qualified and limited their previous declarations in *Pike* v. *Pike* that conduct in the nature of cruelty but not constituting legal cruelty cannot constitute just (or good) cause. According to Denning L.J., since *Oldroyd* v. *Oldroyd* [9] "it has been repeatedly held, by some of the most eminent judges exercising this jurisdiction, that conduct which for one reason or another *falls short of legal cruelty* [10] may nevertheless afford *good cause for leaving and* [10] be a defence to a suit for restitution," and he cited numerous examples from the authorities. Hodson L.J. agreed that just cause "may be distinct from cruelty in that it lacks the element of causing injury to health or reasonable apprehension of the same. To that extent such conduct *falls short of, or is less than, cruelty* [10] to use the language to be found in many of the authorities, but it must none the less be grave and weighty."

The incidental questions of estoppel and *res judicata* in such cases have also received further attention. In the most recent case on the subject, *Bright* v. *Bright*,[11] Willmer J. declined, despite *Timmins* v. *Timmins*, to follow Davies J.'s decision in *Dixon* v. *Dixon*, which he also considered distinguishable, and held that a wife was estopped from pleading constructive desertion on the basis of evidence previously held not to establish legal cruelty in the husband. Accordingly her plea of constructive desertion was struck out, but she was allowed to amend her petition to plead active desertion. *Foster* v. *Foster*,[11a] in the Divisional Court, was also distinguished, because there the wife had, in obtaining an order for desertion and wilful neglect to maintain from one bench of magistrates, added a little to the evidence already held insufficient by another bench to prove persistent cruelty.

The position can hardly be described as clear, and doubtless more litigation will be required before it becomes so, though it does now appear again to be accepted, as before the recent run of cases, that just (or good) cause exists, independently of a matrimonial offence sufficient to ground a petition for dissolution of marriage. Thus one spouse who leaves another and fails to establish cruelty or constructive desertion does not automatically become a deserter, as had been suggested.

Conflicting and delicate considerations are involved; thus the courts are clearly concerned to limit the doctrine of constructive desertion which, *per* Denning L.J. in *Pike* v. *Pike*, "had been

[9] [1896] P. 175.
[10] My italics.
[11] [1953] 2 All E.R. 939.
[11a] [1953] 2 All E.R. 518.

allowed to run wild"; this doctrine is not to be allowed to incorporate mental cruelty. The courts are also concerned, and with good reason, to discourage the making, in matrimonial cases, of allegations against the other spouse that cannot be supported: hence *Jones* v. *Jones* in the Divisional Court,[12] and to ensure that litigation between them shall not be unduly reopened: see the decision of the Court of Appeal of Evershed, Birkett and Romer L.JJ. in *Corbett* v. *Corbett*.[13] Moreover, the judges are constantly impaled by the doctrine that, before relief may be granted from the married state, one party only must be guilty and the other innocent or excused; a primitive concept clearly inapplicable in cases such as *Timmins* v. *Timmins* or even *Pike* v. *Pike*.

There is no clear and logical way through the vagaries of matrimonial misconduct, and perhaps it is in such branches of the law that the inductive process is seen at its best. By contrast, rigid adherence to precedent can only magnify the difficulties of a rigid statutory framework, and it may be hoped that the Court of Appeal will continue, as in *Timmins* v. *Timmins*, to reconsider and qualify its decisions in the light of subsequent cases.

Another trilogy of cases in the Court of Appeal has served to elucidate the somewhat tricky question of conduct that will, or will not, end a state of desertion. In *Crabtree* v. *Crabtree* [14] a husband who had deserted his wife entered into an agreement to pay her a weekly sum for the maintenance of herself and the child of the marriage, "during the joint lives of himself and the wife, if they shall so long live separate and apart from each other." Denning and Hodson L.JJ. agreed in distinguishing *Lord Long of Wraxall* v. *Lady Long of Wraxall* [15] and held that, since the agreement merely defined the duration of the payments and did not incorporate any agreement to live apart, it had not terminated the husband's desertion. In *Dryden* v. *Dryden* [16] the wife had secured a maintenance order against her deserting husband, but when she subsequently committed adultery the husband had the order discharged under the Summary Jurisdiction (Married Women) Act, 1895, s. 7. At first instance it was held that this automatically brought the husband's desertion to an end, and the wife's petition for divorce on grounds of desertion was consequently dismissed, but on appeal Somervell, Jenkins and Hodson L.JJ. held on the authority of *Herod* v. *Herod* [17] that although prima facie the wife's adultery might have terminated the husband's desertion, it was still open to her to discharge the burden of proving that this was not so, and that she should have an opportunity of doing so.

[12] [1953] 2 All E.R. 345.
[13] [1953] 2 All E.R. 69.
[14] [1953] 2 All E.R. 56.
[15] [1940] 4 All E.R. 230.
[16] [1953] 2 All E.R. 533, more fully reported in [1953] 1 W.L.R. 952.
[17] [1939] P. 11.

Hodson L.J. indicated, however, that fairly cogent evidence on her side would be required.

The most interesting case in this trilogy is *Bull* v. *Bull*.[18] Here after six years of married life the parties became estranged, and for ten years there was no sexual intercourse between them. The wife then left the husband for about six months, and when she returned did the family cooking but had no conversation with her husband, apart from inquiries about food, and refused to eat at the same table or to go out with him. After twelve months of this routine she again went and stayed away for about twelve months, returning eventually at the husband's request, but their relationship continued as before. Five years later the husband petitioned for divorce on the ground of desertion. He contended not that while living under the same roof they constituted two separate households, the test laid down in *Hopes* v. *Hopes*,[19] but that this test no longer applied when there had been an initial period of desertion and physical separation. The Court of Appeal of Somervell, Jenkins and Hodson L.JJ., refused to extend the principle of *Bartram* v. *Bartram* [20] to a case such as this. *Bartram* v. *Bartram* was distinguished on the facts, since there the deserting wife returned as a lodger to her husband's house under the spur of necessity—no other accommodation was available within reach of her work. Undoubtedly, however, the decision strikes also at the *ratio decidendi*, at least of Denning L.J.'s judgment in *Bartram* v. *Bartram*, which was, that once a period of desertion has begun to run, it does not cease to run because the parties make an unsuccessful attempt at reconciliation. To that extent, *Bull* v. *Bull* may certainly tend to hamper attempts at reconciliation. True, in this case the husband probably knew what the position would be if his wife accepted his invitation to return, but what is now the position of the deserted spouse in such a case? In inviting the wife to return, would the husband here have been justified in stipulating that it should be as a wife or not at all, and if the wife refused such an invitation, would she remain in desertion?

O. M. Stone.

Children without the Law

Packer v. *Packer* [1] is one of those unsatisfactory cases in which an appeal court of even numbers is equally divided, and the judgment of the court below therefore stands as the decision, in this instance, of the Court of Appeal, not only in the case under litigation but as a precedent binding upon the Full Court of Appeal in the future.

The question at issue was one of statutory interpretation. Are illegitimate children included in the wording of the Matrimonial

[18] [1953] 2 All E.R. 601.
[19] [1949] P. 227.
[20] [1950] P. 1.
[1] [1953] 2 All E.R. 127.

Causes Act, 1950, s. 26, which gives the court power, in any proceedings for divorce, nullity or judicial separation, to provide for the custody, maintenance and education of the "children, the marriage of whose parents is the subject of the proceedings"? Denning L.J. thought that they were, Morris L.J. the only other member of the court, that they were not, so the ruling at first instance that an illegitimate child was not included prevailed.

The Canon Law rule that a bastard child is legitimated by the subsequent marriage of his parents has been part of the law of most of Christendom since the 12th century, except in England, where it was rejected at the Council of Merton in 1235, when "*omnes comites et Barones una voce responderunt, quod nolunt leges Angliae mutari, que usitate sunt, et approbate.*" From January 1, 1927, however, legitimation *per subsequens matrimonium* has become part of the law of England by reason of the Legitimacy Act, 1926, with the unique exception that no child, either of whose parents was married to a third party at the time of his birth, can be legitimated should they subsequently marry.

In *Millard* v. *Millard* [2] Denning J. (as he then was), held that a child legitimated under the Act is "a child, the marriage of whose parents is the subject of the proceedings (for divorce or nullity) under the Judicature Act, 1925, s. 193, now re-enacted as the Matrimonial Causes Act, 1950, s. 26, and that accordingly, on a decree of divorce or nullity, the court has power to make an order for the custody of such a child although no declaration of legitimacy has been obtained. This decision was approved by the Divisional Court in *Colquitt* v. *Colquitt*,[3] which went further and held that such a child is "a child of the marriage" within the meaning of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895–1925, and that accordingly a court of summary jurisdiction has power under these Acts to make a custody and maintenance order in respect of such a child. The court criticised Denning J.'s statement in *Millard* v. *Millard*, however, that parenthood and not legitimacy was the test, and considered that this went too far.

Nevertheless the law was established that a child legitimated under the Legitimacy Act was not only a child, the marriage of whose parents was the subject of High Court proceedings, but was a child of their marriage.

The difficulty arises over the child of adultery, who is not legitimated by the subsequent marriage of his parents under the exception in the Legitimacy Act.[4] In *Harrison* v. *Harrison* [5] Barnard J. held that such a child was not a child, the marriage of whose parents was the subject of divorce or nullity proceedings under the Matrimonial Causes Act, 1950, s. 26 (1), and that the

[2] Reported as *M.* v. *M.* [1946] P. 31.
[3] [1948] P. 19.
[4] s. 1 (2).
[5] [1951] P. 476.

word children in the statute referred to legitimate (or legitimated) children only; accordingly he had no jurisdiction to make an order under the Act for the custody or maintenance of a child of adultery. He added, however, that the fact that a man marries a woman with a young child, whether he be the father of the child or not, is a fact which the court will take into consideration in awarding the woman maintenance after a dissolution of the marriage, assuming that the child was still under age and needing support. However this may be in matrimonial suits, it seems clear that, under the National Assistance Act, 1948, s. 42, a man has now no general liability at public law to support his wife's children by another man.

It was the decision in *Harrison* v. *Harrison* that was in effect under appeal in *Packer* v. *Packer*. Morris L.J. who upheld the authority of *Harrison* v. *Harrison*, rested his decision on three main grounds: (1) Prima facie the word "children" in a statute means legitimate children only; (2) if the wording had covered also illegitimate children then, as this wording has remained unchanged since it first appeared in the Matrimonial Causes Act, 1857, s. 37, it would long ago have been applied to illegitimate children, and in fact it never has been; and (3) the usual wording, "children of the marriage" was not used here because the section comprehends also nullity of marriage, for which it would be inappropriate. The term "marriage," in "the marriage of whose parents . . ." includes cases where the "marriage" is declared not to have been a marriage. This in effect introduces varying degrees of illegitimacy.

Denning L.J., on the other hand, argued mainly *ab inconveniente*, and undoubtedly this case is strong. The mother of the child who cannot be legitimated is granted only the rights and remedies applicable to illegitimate children, even when she is the wife of the child's father. But his viewpoint can also be supported by the strict canons of statutory interpretation.

Public opinion in respect of the illegitimate child has undoubtedly undergone a marked change in recent years. The maintenance obtainable in respect of such a child has now been brought into line with that obtainable in courts of summary jurisdiction in respect of legitimate children. Only the higher maintenance obtainable in the High Court for legitimate children is denied, a distinction which the decision in *Packer* v. *Packer* emphasises. On the matter of parentage two recent statutes, the Legitimacy Act, 1926, itself, in s. 1 (1), and the Adoption Act, 1950, s. 12 (1) explicitly, and other sections of the Adoption Act, *e.g.*, section 2, implicitly, refer to the father, not the putative father, of an illegitimate child. It is no longer true that, at least for the purpose of these Acts, the bastard child has no father in English law; it is alas still the law that, for the purposes of the Matrimonial Causes Act, 1950, s. 26, he is still not his father's child.

O. M. Stone.

The Impact on Recent Decisions of the Royal Commission on Marriage and Divorce

There have been one or two recent indications that the judges have not remained entirely insensitive to some of the evidence given before the Royal Commission on Marriage and Divorce, whose report is still awaited. Thus in *Corbett* v. *Corbett* [1] Birkett L.J. indicated, Romer L.J. emphasised, and the Master of the Rolls agreed, that in hearing an application regarding the custody of the child of a marriage whose parents have petitioned for divorce, the court should not limit itself to the evidence admitted during the divorce proceedings, since in the words of Romer L.J. this would prevent the court "from discharging its paramount duty in matters relating to the care and custody of the children, namely, to ascertain what directions will best serve the interests of the children themselves." This emphatic reminder from the Court of Appeal of the court's duty on such applications should go far to answer the telling indictment of procedure in the past made before the Commission by the National Society for the Prevention of Cruelty to Children.

Moreover, in *Raspin* v. *Raspin* [2] Karminski J. decided (and the reporters reported the decision, presumably *pour encourager les autres*) that he would not necessarily make a finding of adultery with a woman unknown in the standard type of hotel case, when the evidence brought forward might in fact be a mere cover to screen an adulterous association with another woman.

If it is unfortunate that a Royal Commission should be necessary to emphasise the responsibilities that the courts have in such matters, it is at least gratifying that the reminder should bring such speedy, however partial, results.

O. M. Stone.

The Measure and Remoteness of Damages

The recent decision of Upjohn J. in *Otter* v. *Church, Adams, Tatham & Co.* [1953] 1 W.L.R. 156; 1 All E.R. 168, affords an illustration of the problems affecting the measure of damages and the remoteness of damage in contract.

The facts were that M. had succeeded his father in 1941 as tenant in tail of certain estates and became of age in September, 1944. He was then serving overseas with the R.A.F. and his mother as his agent consulted the defendants, his solicitors, who advised her (as they had previously done in 1941) that M. was absolutely entitled and that no action was necessary. M. was killed in action in May, 1945, dying intestate and without issue,

[1] [1953] 2 All E.R. 69.
[2] [1953] 2 All E.R. 349.

and the settled estates passed to his uncle. M's mother, as his administratrix, sued the defendants for breach of a contract to use due skill and care and the learned judge held them to be liable for negligence.

The difficulties in the case arise at this point, because the judge after satisfying himself that a loss to M's estate arose " naturally, *i.e.*, according to the ordinary course of things " from the breach of duty, found that the measure of damages was substantially the value of the settled land.

However just this result may be, two questions require here to be answered: (1) Should the loss suffered by M.'s estate be recoverable at all? and (2) If recoverable, what is the quantum of damages?

(1) The tenant in tail undoubtedly had a right of action during his lifetime but this was for nominal damages only. This is not merely because on learning the true facts he could at once take steps to enlarge his interest into a fee simple; it is because M. alive lost nothing by his failure to disentail. His rights to enjoy and deal with the settled land and to disentail were not in any way impaired by the wrong advice. Had M. made a will complying with section 176 of the Law of Property Act the entail would have been barred on his death whether he was aware of the position or not.

The personal representative's right to sue in contract is the survival of the deceased's own right and he can have no right as such which the deceased himself did not enjoy. It is true that the fact that M. could not have sued for substantial damages is not of itself conclusive against his personal representative. What is significant is that before substantial damages are recoverable at all by any person M. must have died intestate and without barring the entail. It is submitted that this is such an important event as to break the chain of causation. The " loss " followed not from the negligent advice but from M.'s death intestate.

Remoteness can affect recoverability in either of two ways: (a) There is a *novus actus interveniens* between the original wrongful act and the loss; (b) Although there is no *novus actus*, one event leads to another like a series of reverberations and sooner or later it is necessary to draw the line. Damages are only recoverable where having regard to these points damage is either direct, or indirect but reasonably to be contemplated.

The judge found to his own satisfaction that M.'s death intestate in Malaya without barring his entail ought reasonably to have been in contemplation of the defendants. With due respect, this seems to the writers to be foresight of the Hebrew prophet class. The wrong advice had been tendered originally some four years before M.'s death and more than three years before he was in a position to disentail at all. No question could then have arisen of mitigating damage and one may ask what facts ought reasonably to have

been in contemplation at that date; the "loss" held by the judge to be recoverable by M.'s estate would nevertheless have taken place just as surely.

It may be that neglect to make a will was related to the negligent advice (although no evidence appears to have been led on the point) but this is only relevant if M. himself could have sued for damages under this head. Whichever reasoning is adopted, it is submitted that the difference between the damages recoverable by M. in his lifetime and those in fact recovered by his estate arose not from mere "reverberations" after the original breach of contract, but from a *novus actus* causing damage of a new kind to arise, which should therefore be regarded as too remote.

(2) Assuming, however, that the loss suffered by M.'s estate was not too remote, what should then be the measure of damages?

The cases in contract tend to show that (apart from two special cases which will be mentioned) a personal representative's right cannot normally be better than that of the deceased whom he represents.

In contract the question of measure of damages is essentially a question of nominal or substantial damages, since if damages are substantial the actual computation is normally a matter of mathematical calculation. (See for example: *D'Almaida Aruajo Lda* v. *Becker* [1953] 3 W.L.R. 57.) It should follow then that if the deceased's right to damages in his own lifetime is for a nominal sum, this is the only right which survives in favour of his personal representatives.

The two exceptions mentioned are (a) contracts of life insurance (which are not of course *breach* of contract cases); and (b) cases where the death is itself the consequence of the breach of contract. In these latter cases the measure of damages for personal injuries may vary according to whether the person injured dies or not, in much the same way as in tort. When an action is brought for damages for breach of contract resulting in personal injuries, and the injured party is alive at the date of trial, a number of items of damage are inevitably prospective and the court makes an estimate according to certain rules, taking into account age, earning capacity and so forth. Where, however, the injured party is dead these heads of damage are final, and damages are awarded on that footing; these damages may then be more or less than what would have been recovered in his lifetime, because events have demonstrated the facts of what would otherwise be an estimate. (Compare: *Jackson* v. *Watson* [1909] 2 K.B. 193.)

But this cannot apply here because (a) there can be no suggestion that the death was caused by the breach of contract; and (b) there is no justification for varying the measure of damages from nominal to substantial: even the personal injuries cases assume that substantial damages are recoverable in any event, whether or not the victim dies.

It is therefore submitted that even if the deceased's death did not amount to a *novus actus*, the personal representative's right should have been the same as that of the deceased whom she represented—a right to nominal damages only.

It may be added that over the field of law generally there are many cases where the recoverable damages are reduced or extinguished by the injured party's death; there are few, if any (apart from the case of life insurance) where they are increased by the event.

Nevertheless, even if one accepts that the damages flowing from the deceased's death were not too remote and accepting also that the measure of recoverable damages may be increased by the death of the wronged party, it is submitted that this case shows a misconception of the nature of the entailed interest.

It is sufficiently clear that the personal representative's right to sue on a deceased's contract is the survival only of the deceased's right. In this case however the personality of the deceased, surviving in his administratrix, seems to have given way to a personified estate enjoying rights which (as shown above) the deceased himself could never have enjoyed. "The result of this failure to give (the deceased) proper advice might easily result in the loss of the settled estates." The judge does not say by whom the loss is suffered; it appears to be the *persona* of the deceased's estate.

If then the deceased's estate "lost" something we may legitimately ask what it had to lose. An entailed interest is like a series of life interests; the next-of-kin of a tenant for life have no claim whatever on the tenant's interest: so also with an entailed interest—unless and until the tenant in tail bars the entail nothing at all passes to the ordinary personal representatives of the deceased. It follows that the estate of the deceased has not *as such* any interest in what the deceased enjoyed during his life, and hence that all that can be recoverable is his personal loss.

The effect then, is that the judge presumed that a tenant in tail must intend to disentail. Three points may here be made. (a) Suppose that M. had been advised *aliunde* of his right to disentail, but had nevertheless refrained from disentailing, there would undoubtedly have been a cause of action, and his estate would have been the poorer by the value of the settled estates. What would then have been the measure of damages for the breach of duty? (b) There is no authority for the presumption that a tenant in tail intends to disentail. Even assuming that there was evidence from which the judge could properly have found that M. might have preferred to have left the property to his mother and sister, the loss to M's estate must stand by itself without considering in addition in whose favour M. might make a will. The issue was confused by considering what M. would have wished to do with the settled land had he been correctly advised. (c) The problem is not confined to entails but may arise wh never a person may by

a voluntary act increase the quantum of property passing on his death : the exercise of an option to purchase is a case in point, or the severance of a beneficial joint tenancy or possibly even a man's ordering his affairs so that the incidence of death duties is diminished. So long as these acts are matters of free will it is submitted that their performance ought not to be presumed in order to inflate damages recoverable by the owner's estate.

Finally, and by way of postscript, a striking feature of this case is its demonstration that at the present day an entailed interest is regarded not as an estate in its own right, with a history of over 650 years, but as a sort of inchoate fee simple. It is only a few years since there were rules of construction whereby words like " issue " used in wills would import entailed interests and entails were then everyday features of the law of property. In this case, however, the learned judge went so far as to say: " Failure to give M. correct advice would lead to his estate losing the whole of the settled estates," as if M's estate had some right or title to them (which it had not in fact or in law). Fifty years ago it would have been surprising indeed if substantial damages were awarded merely because effect was given to the settlor's intentions.

Hamish R. Gray,
D. Thompson.

Tactical Irritation of Tenants—and Tactless Irritation of Dominions

In *Perera* v. *Vandiyar* [1953] 1 W.L.R. 672, the plaintiff was the tenant of a flat within the protection of the Rent Restriction Acts of which the defendant was the landlord. In order to evict the plaintiff the defendant turned off the taps and switches which were in a cellar occupied by the defendant, and locked the door of the cellar, with the result that the plaintiff was deprived of all gas and electricity. Having no alternative means of lighting and heating, the plaintiff and his wife and baby left the premises. In proceedings in the county court, besides general and special damages for breach of contract, exemplary damages in tort were awarded. The Court of Appeal reversed the decision of the county court on exemplary damages.

The plaintiff relied on *Lavender* v. *Betts* [1] where Atkinson J. had awarded aggravated damages in trespass when the landlord, in order to remove his rent-restricted tenant, removed the doors and windows from the premises. All three judges distinguished this case on the ground that they were not satisfied that there was any trespass here. They were right, because the act was too indirect for trespass.

[1] [1942] 2 All E.R. 72.

This leaves two questions unanswered. If not trespass why not case? Was not this an unreasonable use of land which substantially interfered with the use and enjoyment of the land of another and caused him damage, and therefore an actionable nuisance? The court was not, it seems, invited to consider this. But even so, would that be a tort for which exemplary damages might be awarded? In one judgment only, that of Romer L.J., is this touched on. He says (at 677): "But he (the defendant) did not bring himself into the area of tort which would justify the awarding of a further sum under the head of punitive damages." If this is intended to mean that exemplary damages cannot be awarded where the act is so indirect that it is case and not trespass, it is submitted that it is wrong.

Emblen v. *Myers* [2] may be the case most in point. The defendant was required by the police to pull down his dilapidated house. When his neighbour, the plaintiff, refused to sell his premises to him, the defendant pulled down his house in such a way that the plaintiff was unable to use his premises for their ordinary purposes: this the defendant was proved to have done in order to cause the plaintiff to give up the premises. In an action on the case the trial judge directed the jury that they could give exemplary damages if they found that this was the motive, and the Court of Exchequer was asked to order a new trial for misdirection. The four judges unanimously upheld the summing-up of the judge that these damages were properly awarded, Channell B. saying: "If in actions of trespass the plaintiff may recover damages beyond the amount of the actual injury I see no reason why the same rule should not extend to wilful negligence," and Bramwell B. saying: "Suppose a person caused a nuisance in front of another man's house, damages might be given for the insult as well as the actual injury."

There seems then no reason why a landlord who does an unlawful act on land occupied by him indirectly disturbing the enjoyment by the tenant of the demised premises with the intention of compelling the eviction of the tenant should not be compelled to pay exemplary damages in a suit in tort.

H. Street.

In *Perera* v. *Vandiyar*, the Court of Appeal (Evershed M.R., Birkett and Romer L.JJ.) has held that irritation tactics by a landlord not amounting to trespass or other independent tort, intended to compel and actually compelling a tenant to leave premises in circumstances where the landlord has no power to determine the tenancy, do not in themselves amount to a "tort of eviction." (They may, and did in this particular case, constitute

[2] (1860) 6 H. & N. 54.

a breach of contract.) The decision may be said to mark the limits of the law of trespass, on the one hand, and of invasion of a statutory right on the other. It may also be said to underline the consequences of the absence from English law of any general remedy for " abuse of rights." It would, incidentally, be interesting to know just how the landlord contrived to cut off the supply of gas and electricity to the premises without committing even a technical trespass; the report gives no information on this point, and Sir Raymond Evershed merely said " nor am I satisfied that there was any trespass here in relation to the gas and electricity."

However, the main purpose of this note is to deplore the failure of counsel and of the court to examine two decisions of the Supreme Court of New Zealand which came under the court's notice because they are cited in *Megarry on the Rent Acts*, 6th ed. at p. 187. The passage in which they are cited was apparently treated by the trial judge in the instant case as authority for the existence of a separate " tort of eviction." Actually Mr. Megarry's observations, although a little ambiguous, do not confidently assert the existence of any such nominate tort. Perhaps his proposition that " a landlord will be liable in damages if without an Order of the Court he evicts a tenant protected by the (Rent) Acts . . . peaceably " could be interpreted as intending to include cases where the landlord does something not amounting to a trespass which makes life uncomfortable for the tenant, but it is more likely that Mr. Megarry was intending to include only the sort of circumstance dealt with in the New Zealand cases to which he refers—*Johnston* v. *Fischer* [1921] N.Z.L.R. 529, and *Tankard* v. *Twomey* [1922] N.Z.L.R. 79. In each of those cases (decided by Hosking J. at first instance and not taken on appeal) the landlord entered upon premises, the subject of a statutory tenancy, in purported exercise of his common law power to " enter upon a part in the name of the whole and thereby determine the tenancy " (in the archaic words still so frequently used in leases). It was not a " peaceable ejection "—probably there can strictly speaking be no such thing—but an attempt at a peaceable re-occupation. What actually occurred was, given the continuance of the tenancy by virtue of the legislation, a simple act of trespass, for which damages were awarded accordingly.

The many friends and admirers made by Sir Raymond Evershed on his visit to Australia in 1951, as a guest of the Commonwealth at the Jubilee Celebrations, will be disappointed that his Lordship did not insist on these New Zealand cases (which are readily available in London) being produced to the court, even though their production would merely have confirmed the court's decision and indicated the sense in which Mr. Megarry's dictum should be interpreted. It has for long been felt by Dominion lawyers and courts that somewhat more pains should be taken by English tribunals, whose opinions are so habitually cited and so

respectfully regarded in the common law Dominions, to make themselves equally well acquainted with the decisions of the senior Dominion courts. If relevant decisions are not cited in argument, it is the fault of counsel, but when decisions come to the court's notice, especially on a difficult and substantially new point, it is suggested that they should be obtained.

GEOFFREY SAWER.

NEGLIGENCE AND TRESPASS

MOTORISTS who, being unable to buy a new car, have nevertheless allowed their old vehicle to get into a dilapidated condition, will be interested in, if they do not receive much comfort from, the decision of F. B. Adams J. in the Supreme Court of New Zealand in *Everitt* v. *Martin* [1953] N.Z.L.R. 298. The facts were that the plaintiff parked his car in a street in the City of Auckland where vehicles were parked at an angle to the pavement. The plaintiff parked next to, and to the right of, the defendant's car which was admittedly dilapidated. In particular, one of the front mudguards of the car was broken, causing a portion of the mudguard to project beyond the other portion. There was a space of about 2ft. 6ins. between the cars. In this space the plaintiff alighted and moved towards the pavement. He felt his coat catch on something on his left side and, on looking down, found it was torn. In the lower court, it was found as a fact that the plaintiff had torn his coat by brushing it against the broken mudguard of the defendant's car. The plaintiff claimed for the damage to the coat. His claim was upheld both in the lower court and on appeal.

The learned judge, after a discussion as to the distinction, in law, between nuisance and negligence, found that, in leaving his car in that position on the highway and in that condition, the defendant had been negligent thus giving rise to a prima facie cause of action in the plaintiff. It was also found, as a fact, that in brushing against the broken mudguard, the plaintiff had not, himself, been guilty of negligence.

One of the defences raised by the defendant was that the plaintiff, in brushing against the defendant's car, had been guilty of trespass to the car and that the defendant could not be under a duty to foresee and guard against harm that could be incurred only by an act of trespass. The plaintiff's act of brushing against the car had not caused any damage to the car. F. B. Adams J. dealt at length with and rejected this defence. He based his decision on the point that an action for trespass to chattels would not lie unless there was either an asportation or else damage to the chattel. The authorities on this point are confused. The learned judge, after referring to the textbook authorities, based his decision on the old case of *Slater* v. *Swann* (1731) 2 Stra. 872 in which it was held

that trespass to another man's horse is not actionable without a "special damage." No reference was made to the cases of *Owen and Smith* v. *Reo Motors* (1934) 151 L.T. 274 and *G. W. K., Ltd.* v. *Dunlop Rubber Co., Ltd.* (1926) 42 T.L.R. 376, in both of which there is a suggestion that an action for trespass to a chattel will succeed even though no damage *to the chattel* is proved. It may be objected that in both cases there was asportation and that consequently proof of damage to the chattel was not necessary.

But whether the learned judge was right or wrong on this point, it is submitted, with respect, that his conclusion on the issue of "accidental contacts" was correct. He said (at p. 303): " . . . a consideration of the material discussed above leads me to the conclusion that there is no right of action in the case of merely accidental contacts where no damage is done." No further authorities for this proposition were cited. The learned judge probably meant that, even if there had been a trespass to the defendant's car, a good defence to an action for that trespass was inevitable accident, the plaintiff's act being neither, as was expressly found, negligent nor, obviously, intentional. Such authority as there is supports this view. For example, Atkin L.J. in *Manton* v. *Brocklebank* [1923] 2 K.B. 212 said (at p. 229): "If *Holmes* v. *Mather* (1875) L.R. 10 Ex. 261, be correctly decided, trespass to goods must be the result of an act either wilful or negligent." Winfield (*Textbook of the Law of Tort*, 5th ed., p. 44) is of opinion that inevitable accident is a good defence to any tort with the probable exception of the rule in *Rylands* v. *Fletcher*. It must be remembered, however, that, in circumstances similar to those in the instant case, it is for the defendant to prove that there was no negligence on his part; that, in other words, the trespass was the result of inevitable accident. That may, in some cases, be a difficult task.

A. G. Davis.

Ormrod v. *Crossville Motor Services, Ltd.*, noted at p. 378, *ante*, has now been affirmed by the Court of Appeal: [1953] 1 W.L.R. 1120.

King v. *Phillips* [1952] 2 T.L.R. 277, which inspired Professor Goodhart's article (at p. 14, *ante*) on "Shock Cases and the Area of Risk," has been affirmed by the Court of Appeal [1953] 2 W.L.R. 526. Professor Goodhart deals fully with the judgments in the Court of Appeal in a further article, "Emotional Shock and the Unimaginative Taxicab Driver," in 69 L.Q.R. 347.

R. v. *St. Helens and Area Rent Tribunal, ex p. Pickavance* [1952] 2 Q.B. 370, criticised at p. 79, *ante*, has been reversed by the House of Lords, *sub nom. Preston and Area Rent Tribunal* v. *Pickavance* [1953] 3 W.L.R. 242.

REVIEWS

A History of English Law. By Sir William Holdsworth, o.m. Vol. XIII. Edited by A. L. Goodhart and H. G. Hanbury. [Methuen & Co., Ltd. London. xlviii and 803 pp. 70s. net.]

The thirteenth volume of Holdsworth's *History* was practically completed in manuscript by the beginning of the war; during those dangerous days it was sent for safety to the United States; but Holdsworth did not survive the war and it has been left to his literary executors, Professors Goodhart and Hanbury, to steer this bulky volume through the press. To them we must first do homage. They have supplied commentaries on Tidd's *Practice* and Maddocks' *Equity*, the compilation of which Holdsworth clearly postponed until too late, and they have done this so well as to make us regret all the more that other lacunae of the same kind have not been filled in the same way; we would have welcomed a short note on Allen's *Prerogative*, interesting to the historian if only as the source of much confusion over the meaning of *folk-land*; above all something should have been said of H. J. Stephen, the Stephen of the Commentaries and the author of a famous book on Pleading first published in 1824 and at least equal in importance to Tidd's *Practice*. They have quietly added a few footnotes and brought up to date references to those textbooks of the period which have survived in new editions to our own day. In one instance they have had to guess, and we venture to think that they have guessed wrongly. Holdsworth, minded to illustrate the literary qualities of Stowell's judgments, indicated a passage in his judgment in *The Indian Chief* seemingly by transcribing its first and last sentences. Those sentences alone survive in the text, the central portion being supplied by an editorial condensation on the grounds that it is not clear from the manuscript how much of the judgment the learned author intended to reproduce. Now there is nothing in those two sentences to warrant their inclusion in that "anthology of striking passages" which Holdsworth had in mind. The omitted passage, embellished with an apt Vergillian verse, is another matter, and we believe that Holdsworth wanted the whole paragraph, a belief that is strongly supported by his *Some Makers of English Law* where the omitted passage is printed in full with an introduction in words identical with those of the *History*

But the editors' main task has been to prepare the original matter for the press, a task in any event sufficiently great when it involves 700 pages closely packed with detail, figures, names, dates and all the apparatus of a learned exposition *non sua poma*, but which if the working manuscript be anything like those Holdsworth manuscripts we have seen, must have been almost overpowering, calling for all that patience and erudition which the editors fortunately possess. That they have triumphed will be evident to every reader; we ourselves have noticed only one trivial blemish (the "strip settlement" of p. 295 we count as entire gain)—where a passage from the *Law Review* has been allowed to intrude upon the judgment of Lord Justice Turner in *Jenner v. Morris* (see p. 629). Nor must we fail to echo the editorial thanks to Dr. Jaworczykowski, who has checked all the references and compiled the indices; one index in particular devoted to all books and periodicals referred to or cited in the text and notes forms an invaluable bibliography for the period.

Here then is the authentic Holdsworth, warts and all—or, as we feel sure he would himself have phrased it, with all the defects of his qualities. Holdsworth was no stylist, though a good judge of legal style in others. Yet he passes one of the first requirements of the good writer by displaying in every page his own especial personality. One can hear almost in each sentence

his well-remembered voice, quiet, awkward perhaps, but never monotonous. Here too is his remarkable grasp of detail and his extraordinary capacity for marshalling his facts in almost mathematical array. Here too is that delightful twinkle in his eye as he savours to the full some legal anecdote or the pedant humour of the *Pleader's Guide*. Here too is his deep humanity, illuminating and illuminated by his intense interest in the lawyers who applied and created the law. Here are no harsh verdicts. Of the many judges who appear in these pages there is perhaps only one (Leach V.C.) for whom there is nothing good to be said. Shadwell is almost in like case, but who could be hard upon one who is said to have granted an injunction while bathing? And for some at least he is prepared to reduce the sentence passed on them by their contemporaries. Erskine, unchallengeably supreme as an advocate, might after all have had more purely legal talents than his brethren gave him credit for. Even Brougham, the arch-spiv of the law, squandering his great talents with the irresponsibility of a charlatan, even "Lord Facing-both-ways," as Peacock called him, finds salvation at last for his loyalty to the cause of law reform, the one consistency of his life. Such are the traits we knew and loved during Holdsworth's life—such they appear as he lives again in these pages.

This thirteenth volume covers the period from 1793 to 1832, a period not propitious some may think for the display of Holdsworth's genius. The eighteenth century had gone, leaving behind it besides a new economic theory an emotional urge towards democracy which found expression in trade unionism and corresponding societies and a host of political nostrums from communism to hero worship. Now Holdsworth was no democrat, and he took no pains to avoid expressing in his *History* a distrust of the growing egalitarianism of the nineteenth century—"the tacit acceptance of ill-digested democratic theories as to the presumptive right of every man to a vote." He was perhaps happiest in the eighteenth century with its balanced constitution dependent for the maintenance of its balance upon logical anomalies, especially those most logically indefensible anomalies, the rotten boroughs themselves. This balance was to be swept away by the Reform Act. The constitution was thereby irreversibly directed towards an extension of its democratic elements, artificial in themselves and hitherto incapable of control by artificial checks and balances, a movement which has inevitably "tended to give undue weight to the most numerous and the least educated class of the community." Mill's simple faith in the majority was based upon the "enormous mistake of supposing that the behaviour of the lower classes in a manufacturing town under a democratic constitution would be the same as the behaviour of the lower classes in the country or a country town under the aristocratic constitution of the eighteenth century." Thus it is no doubt true, as Bentham pointed out, that under any general scheme of confiscation of property it would in the long run be the poor who would suffer the most, yet "the poor are the last people to take long views"—as witness much of our "socialist legislation" (Holdsworth did not live to see the election of 1945 but he characteristically refused to adopt Dicey's neutral tinted "collectivism") which "will in time have the same effect as religious persecution had in some continental countries in the sixteenth and seventeenth centuries. In the future as in the past the elimination of the most independent and progressive minds in a nation will permanently lower its moral and intellectual standard." In the meantime we have to live under a democratic constitution in which "there are very few checks upon the sovereignty of the majority of the House of Commons and its agent and master the Cabinet."

These are hard sayings, the product no doubt of a severe intellectualism which could coexist with Holdsworth's humanity only perhaps after a lifetime's residence in Oxford. The validity of his views is irrelevant, but they inevitably raise the question—is it possible for one who holds them to give an account of a period which was essentially a seething cauldron of new ideas with which he was not in sympathy, and to trace their influence on the development of English law? Now history, even legal history, cannot be written without bias, and it

is perhaps as well for the historian that he should be so clearly conscious of his own bias, for this self-knowledge is the basis of intellectual honesty. And we may say at once that Holdsworth's intellectual honesty was such as to bring him triumphantly through what must have been perhaps something of an ordeal. He may be forthright in his condemnation of views which he disliked, but at least those views are fearlessly and fairly presented. Tom Paine and even Godwin receive the same scrupulous attention as Coleridge. Much more important is his treatment of Bentham; but here the atmosphere is much more favourable, as Holdsworth was never an opponent of law reform and Bentham's major work as a law reformer was carried out in the days "before he became a democrat." Bentham of course overshadows the period covered by this volume, and Holdsworth devotes something approaching 100 pages to an account of his life and a detailed analysis of his work and writings. This section is one of the most remarkable in the volume, perhaps indeed in the whole of the *History*, for it represents admirably Holdsworth's extraordinary capacity to analyse complicated facts and to illustrate abstruse ideas. Much has been written of Bentham lately. It was indeed unfortunate that the present volume had not appeared at the time of Bentham's bi-centenary in 1948, for Holdsworth's commentary will unquestionably be welcomed as an outstanding contribution to the history of Bentham and of Benthamism. Yet characteristically Holdsworth emphasises time and time again that the practical success of Benthamism in the sphere of law reform was due not so much to the unpractical Bentham as to the work of the great lawyer statesmen of the time, those very men who represented the system of law which Bentham had spent his lifetime in attacking. Brougham's great speech of law reform in 1828 was as fundamental and important as anything that Bentham wrote. Law reform had already begun before 1832, and it was to continue along the same lines thereafter though at an increased rate. The essential feature of the story was "that Bentham's suggestions were not accepted literally but were worked into the fabric of English law by learned lawyers. Those lawyers were saturated with that historical tradition which has been one of the great forces which have made for the continuity of English law. And so the reforms in the law were made by men who combined the strong points of Bentham and Coleridge. This method of reforming the law has, it is true, made the process of reform slow, but it has had advantages which more than compensate for this defect. By preserving the continuity of English law it has helped to preserve that respect for and trust in the law which, from early periods in our history, has been a marked characteristic of the national character. By ensuring a large measure of agreement as to the substance of the reforms which were desirable, it has put the law to a large extent above party, and so has provided a basis of agreed principles, without which a system of party government is a constant menace to the peace of the state."

The second half of the present volume deals with what in earlier volumes has been called the professional development of the law. It begins with an account of the reports and reporters of the period, necessarily little more than a list with occasional biographical notes of the more eminent reporters; for the system of reporting had by this time become standardised and generally reached a high state of efficiency. It is curious, however, that though this period is pre-eminently the period of the "authorised reports" there is neither in this volume nor in previous volumes any really satisfactory account of the origin of this system of authorisation. There follows a section on the literature of the common law, again less interesting than the corresponding sections of earlier volumes because of the paucity of material of general interest to the historian. None the less, though no single textbook of outstanding interest was produced save perhaps in the sphere of Procedure, there is a marked increase in the number of publications, and the average book attains perhaps for the first time the high standard of dull efficiency which is still today a feature of professional literature. Indeed, we begin to get names still familiar to the

practitioners of today—Archbold, Chitty and Woodfall amongst others—a striking comment on the continuity of professional taste and on the more conservative tendencies of modern publishing methods. And even here one cannot help admiring that easy familiarity with the sources which has enabled Holdsworth to give us a bibliography of the period of immense value to the future research worker.

Whatever may be thought of the merits of the legal writers of the period there can be no doubt of the eminence of its judges. Tenterden, Ellenborough, Eldon, Stowell—their names echo down the years as a perpetual inspiration and challenge; English law itself could be well content to be judged by the witness of these men. With such rich material Holdsworth was completely at home, and he could give full rein to his conviction that the biographies of great English lawyers afford the most certain clue to the nature as well as to the greatness of English law itself. Here more, perhaps, than with earlier judges, his task has been rendered lighter by the labours of his predecessors, in addition of course to the inevitable but none the less remarkably able Campbell, and he has made full use of the work of such men as Twiss, Townsend and Atlay, as well as of his own remarkable knowledge of contemporary literature and in particular his equally remarkable insight into the legal atmosphere of the times. Each biography is accompanied as usual by a sketch of the major legal decisions in which the particular judge took part, and occasionally but all too rarely one gets some incisive comment by Holdsworth himself sufficient to remind us that Holdsworth was not merely a great historian but an equally great lawyer. Nor are the lesser legal luminaries overlooked. The author of *Charles Dickens as a Legal Historian* could hardly avoid a kindly glance towards Mr. Justice Gaselee, while *Holdsworth* would not be *Holdsworth* without some luscious citations from the more obscure dicta of the learned Sergeant Arabin. But here we must lodge a protest. The editors (we dare not accuse Holdsworth himself of such impiety) have ruthlessly torn aside the thin veil of anonymity with which tradition has shrouded the learned reporter of Arabiniana and which Sir Frederick Pollock so carefully and faithfully maintained. We would beg them to make the only reparation within their power; let them in the promised fourteenth volume print in full this delicate little pamphlet, so that appendix shall speak to appendix across the volumes and the learned sergeant may enter as an equal into that legal Elysium in which Crogate sports with Surrebutter in the Shades and the Circuiteers pipe their Vergillian warblings on Winander's shore.

It would be as difficult as it is unnecessary to assess the relative merits of these biographies; but we cannot refrain from saying something of that of Erskine, if only for the contrast between the author and his subject, between the Oxford scholar and the sailor-soldier turned "clever nisi prius pleader" as Campbell peevishly called him. Whatever Holdsworth may have us think, Erskine was no lawyer. He became Lord Chancellor only by a series of accidents, and retained office for little more than a year. He was a Whig, and his reputation as an advocate was founded on his defence of men with whose political views Holdsworth could have had no sympathy. Yet of him Holdsworth writes with admiration and an enthusiasm which makes us hear once again the magic of Erskine's voice and feel again the expectant hush in which he rose to address the court. Perhaps it is not too fanciful to feel that here we have Holdsworth's tribute to the Bar. He was saturated with the great tradition of the Bar, the result not of the daily contacts of a busy practice but of a lifetime's study of English Legal History. He had a very acute sense of the organic unity of legal development—those to whom the thirteen long volumes are too packed with detail should study his brilliant Tagore Lectures on *Some Makers of English Law*, which is in substance an authoritative guide to the greater work and far and away the best introduction to the subject as a whole. That unity is a web of many threads throughout which the golden thread of professional tradition continuously gleams. Thus it was that as he

wrote the personalities of the great lawyers of the past gripped his imagination and became in the later volumes the real protagonists of his *History*. Among the torch bearers of this great tradition Holdsworth is assured of no mean place.

A. D. Hargreaves.

Land Planning Law in a Free Society. By Charles M. Haar. Harvard Legal Series. [Harvard University Press. London: Geoffrey Cumberlege. 1952. 210 pp. 25s.]

As its source indicates this survey of the underlying principles and operation of the Town and Country Planning Act, 1947, is by an American, and its purpose is primarily to expound these matters for the benefit of American readers. As its date shows it was written well before the latest legislation. It would, however, be a mistake to deduce from these facts that an English reader would derive little benefit from it. There is the advantage that the author can take a detached view; detached, that is, from native arguments, and his comments and criticism have therefore added value. Moreover, the purpose of the book necessarily meant that the author could take little for granted and the result is a clear picture of the Act and of its place in our law and society which will be welcome to those who may have been confused by their proximity to the details. Finally the author is evidently an enthusiast in the matter of town planning, and enthusiasm always makes for good reading.

Despite its series the book is not a lawyers' book in any narrow sense. It is as much concerned with the social, economic and administrative background of the Act as with its strictly legal consequences. In that lies its great merit. Thus the exposition of the ideas behind, and interrelation of, the development charge and the nationalisation development rights makes sense of what may sometimes be seen as a purely freakish or political piece of legislation. The defects of earlier legislation are carefully examined, as is the present machinery. Indeed, as a general exposition of the working of the Act both administratively and in its effect on individuals the book merits careful study, and in matters such as the techniques of the development plan does much to make the Act live and have reason. In the concluding chapter the author draws some tentative conclusions. A major criticism he finds in the weak position of the Minister *vis-à-vis* his colleagues, though recent changes have affected that matter. He emphasises that the Act has still not removed the chance benefits derived by individuals from communal enterprise. He stresses the need for planning to be for the benefit of the planned, not the planners, and of the possibility under present arrangements of administrative complexity and delay. When all is said, he concludes that the Act "puts Britain in the lead of democratic planning for land."

In the face of such a compliment it may seem ungracious to criticise. There are, however, a few matters which call for comment. Some are matters of detail. The inappropriateness of the Ministry of Health to deal with planning matters in the past can, it seems, be overemphasised. The Minister's inspectors were on such occasions as Boundary Extension Inquiries intimately concerned with such matters, and by experience were much better qualified to deal with them than the letters after their names or the ranks before them might suggest. On the process of combining loan sanctions and planning permission perhaps too little weight has been given to administrative arrangements. In effect in law the word "absolute" in the phrase "fee simple absolute" never had much relevance to user. These however are small matters. On broader grounds perhaps it may be said that the author's enthusiasm has at times carried him away. There is some tendency to overemphasise planning matters. There are considerably more powerful influences operating for the reform of local government than the planning requirements which the author discusses. Similarly, many administrative devices which appear in the 1947

Act are little more than common form in post-war legislation, a matter which might be made clearer to get a true picture. Again, there is perhaps some disposition to exaggerate the desirable position for the Minister. Doubtless the function of land planning is of importance from an economic and social point of view, and it is probably true that these aspects have been too little regarded in the past. Nevertheless the conflicts between a Minister responsible for land planning (whatever his name), and his colleagues in the government can be resolved only at cabinet level and ultimately in affairs of government persuasion can be the only weapon. With the present wide control in economic affairs of the Chancellor of the Exchequer there seems little room for another master-minister. Finally the author's anxiety to justify whenever possible the English experiment perhaps leads him to emphasise almost to excess the respectability of planning. The share of Conservative administrations is laboured, and leads to such remarks as "the British Broadcasting Corporation, the Central Electricity Board and the London Passenger Transport Board were all nationalised under Conservative governments." Perhaps, though, it is merely being academic to hope that measures should everywhere be judged exclusively on their merits and not on their parentage.

These defects, if such they are, are merely by the way. They would not call for comment if the book were not otherwise so good as a clear and well documented[1] account of the Act, which is completed by a good selection of charts and diagrams.

J. D. B. Mitchell.

The Lands Tribunal Procedure and Practice. By Spencer C. Rodgers. [London: The Estates Gazette, Ltd. 1952. xxxi and 326 pp. 27s. 6d.]

Apart from the Tables, this book contains 192 pages of text, 82 pages of Appendix in which are set out various statutory provisions, and 52 pages of Index. The whole is clearly designed as a work of reference for the practitioner, is likely to save him a considerable amount of time, and for that reason alone is valuable. The author has tried, with considerable success, to include notes on as many practical and relevant problems as he could think of. Consequently the book is unavoidably somewhat staccato in tempo. When the author is dealing with machinery, practice and procedure, he conveys much information fairly succinctly.

In view of the title and, we may therefore assume, the purpose of the book, it is a little surprising to find passages of general law. The author would have been better advised to omit them. The first few pages on the status of the Tribunal contain an attempt to place the Tribunal in relation to other judicial bodies. This attempt at classification is probably unwise and certainly unhappy. The author finds in the judgment in *Racecourse Betting Control Board* v. *Secretary of State for Air* (1944) that there are *at least* three classes of tribunals. These are (1) courts (2) arbitration tribunals to which the Arbitration Acts apply and (3) special tribunals which are neither of these. His next step is to investigate whether the Lands Tribunal is a "court." He writes: "If . . . the Lands Tribunal is a 'court' it will be because it is a place where justice is judicially administered and it therefore becomes necessary to consider its functions, are they judicial, quasi-judicial or administrative." The author then sets out the "four essential characteristics of a judicial process" listed by the Committee on Ministers' Powers. His next sentence reads: "The mere fact that a tribunal acts judicially is not in the least conclusive that it is a judicial tribunal, as distinct from a quasi-judicial

[1] On behalf of readers of footnotes, may a plea be entered for stopping any growth of the idea that the right place for footnotes is at the end of a book? It may be convenient for publishers, but it is not for readers.

or administrative one. . . . Still another question is whether the Lands Tribunal is a court in law." Finally the conclusion is reached that "in the strictest sense the Lands Tribunal is not a court but that, of all the statutory tribunals not expressly made courts, it may well be the most akin to one." What are we to make of all this? There is surely no object in repeating a classification of tribunals which is expressly not meant to be exhaustive and therefore may not cover the particular Tribunal we are attempting to classify. The Committee on Ministers' Powers were, in their four characteristics, attempting to distinguish a judicial from a quasi-judicial *decision*, not a judicial process; but if their procedural distinctions are quoted, what is meant by commenting at once that this is not in the least conclusive? What is the difference between "court" as classified in judicial pronouncements and "a court in law"? What is the consequence of saying that the Lands Tribunal is "the most akin" to courts in the strictest sense? What, indeed, is meant by "the strictest sense"? The author has not realised the simple and basic fact that the idea of a "court" or "judicial" administration is variable. He is chasing a shadow. The substance is quite different. It is merely to find the answers to such questions as "Will certiorari issue to the Lands Tribunal"? "Are defamatory statements made before it privileged"? With the first of these the author deals. His mistake is to assume that general deductions as to status can be made from the answers to these questions or, indeed, that there is any purpose in attempting to make such deductions.

The production of the book is patchy. On p. 28, for example, there are passages in the text in print so small as to be almost unreadable, while on p. 40 the address and telephone number of the Tribunal are set out as generously as on the most elegant envelope.

Perhaps I have overstressed the faults which irritated me. The book remains a valuable collection of material not easily obtainable elsewhere. Practitioners may well find it of considerable use as a guide to practice and procedure.

J. A. G. Griffith.

Le Droit Administratif Américain. Notions Générales. By Bernard Schwartz. Preface by M. Henry Puget, Conseiller d'État. [Paris: Libraire du Recueil Sirey. 1952. x and 249 pp.]

Professor Bernard Schwartz, the volume of whose writings on public law already provides a source of wonderment to some of his more languid colleagues, has taken another step towards the fulfilment of an arduous and intriguing task. It is to expound the principles of American administrative law to students in other countries, and to make a corresponding exposition of foreign systems for his compatriots. As M. Puget observes in his preface to the present volume, which is published under the auspices of the Institut de Droit Comparé of the University of Paris: "L'oeuvre est vaste, de nature à s'étendre au monde entier; elle exigera de longues années." Those who have read Professor Schwartz's *American Administrative Law*, which was written for English readers (reviewed 14 M.L.R. 95), will find his new book to be substantially similar in content and method of presentation. The main difference lies in an increased emphasis on judicial review and proceedings against the State. He finds a good deal in common between the rules of substantive law applied in the French and American systems, and where divergences exist he sometimes concludes that they order things better in France. That France should be given higher marks than England in a comparison with the United States is hardly surprising, for Professor Schwartz is deeply concerned at the prevalence of what he tends to regard as "administrative absolutism" in the Anglo-American systems and holds strong views on the attenuation of judicial

review. His forthcoming book on French administrative law, written for Americans, will be received with interest in this country.

S. A. de Smith.

Constitutional Laws of the Commonwealth. By Sir Ivor Jennings, Q.C., Litt.D., LL.D., Vice-Chancellor of the University of Ceylon, and the late C. M. Young. Being a Second Edition of Constitutional Laws of the British Empire. [Oxford: at the Clarendon Press. 1952. xxiv and 520 pp. 35s. net.]

Jennings and Young's *Constitutional Laws of the British Empire* is one of the few outstanding students' casebooks, comparable in its quality and arrangement with *Keir and Lawson*. Its second edition, published after an interval of fourteen years, appears under a title that acknowledges the nice regard that it is to be paid to terminology in Commonwealth affairs. The substitution of "Commonwealth" for "British Empire" will be accepted by all except those who share on the one hand the views of the New Zealand Attorney-General to whom the changing structure of the Commonwealth was "all the fault of that damned Statute of Westminster," and on the other hand the views of Mr. Palme Dutt, to whom "Commonwealth" is a euphemism coined by "the more mealy-mouthed apologists of imperialism."

The new edition is considerably larger than the old. New chapters deal with New Zealand, India and Pakistan, Ceylon and the Republic of Ireland; extracts from the relevant constitutional documents are added. It is curious that Ireland, after her secession, finds a place in a book on the Commonwealth that she was denied while she was still a member of the association; but her eligibility is perhaps greater now that she has excluded herself in than when she was engaged in including herself out. Recent developments in membership of the Commonwealth and citizenship legislation are analysed, and the legal aspects of the right of secession from the Commonwealth are discussed with the mastery that we have come to expect from the foremost of our public lawyers. One cannot, however, refrain from regretting that despite the date of the preface few developments have been noted that have occurred since the latter part of 1949. The preparation of a new edition is therefore already called for, and it is to be hoped that Sir Ivor will be able to find the time to undertake the work of revision in the near future.

S. A. de Smith.

Ceylon. By Sir Ivor Jennings, Q.C. and H. W. Tambiah. [Stevens & Sons, Ltd. xvi and 319 pp. £2 15s. 0d. net.]

In the entire series *The British Commonwealth: The Development of its Laws and Constitutions*, it is unlikely that any other volume will have required the same degree of fundamental research or will provide the same measure of original information as Vol. 7, on Ceylon. The laws of Ceylon are a mixture, or confusion, of five systems of law, two occidental (Roman-Dutch and English) and three oriental (Hindu, Kandyan and Islamic); and as the authors state in their Preface, "there has been no 'Halsbury' or Holdsworth, no comprehensive digest of cases and no annotated edition of legislative enactments." Their avowal that "In the circumstances, it has not been easy to prepare a coherent account of this complicated system" will be readily accepted: and it is especially to their credit that the account they have produced is not only coherent but eminently readable.

The book is divided into sections on Public Law, the Courts, and Civil and Criminal Law. The first part sketches the constitutional history of the Island from the Sinhalese landing in 483 B.C. to the Constitution of 1948. (It is a

significant pointer to the obscurity of the Island's history that the Chronological Table records no events in the 1100 years from 101 B.C. to A.D 1001.) The account of successive conquests, from the Tamil invasions of the second century B.C., through the Portuguese and Dutch occupations, to the year 1815 when George III became King of Kandy, provides the social framework for a heterogeneous legal pattern which must be of absorbing interest to the student of comparative jurisprudence and the conflict of laws. The modern constitution is largely based on the British model, but many of our constitutional conventions have been enacted as law. Sir Ivor Jennings' account of its origins is enlivened by a number of shrewd observations; he writes on p. 31, for example, "a Commission taking evidence on constitutional questions must inevitably listen to a more emphatic statement of claims, on both sides, than the large element of common interest would warrant. . . . Commissions cannot study communalism because they help to strengthen communalism. It is stronger while they are in the Island than it was before they arrived, or than it will be when they depart."

The greater part of the book is the work of Mr. Tambiah, an Advocate of the Supreme Court, whose account of the multiplicity of courts and legal systems is a model of compression. The late Sir Francis Soertsz, K.C., contributed the final chapter, on Criminal Law.

The book is, as must be expected, not without minor faults. There is a biographical inaccuracy on p. 112, where it is said of Chief Justice Lushington—who about the year 1807 was engaged in a fierce dispute with Governor Maitland on questions of jurisdiction—that after his return to England "he adorned the Court of Admiralty." The Chief Justice of Ceylon was Edmund Henry Lushington, who later became Chief Commissioner of the Colonial Board of Audit and Master of the Crown Office. It was his second cousin, Stephen Lushington, who from 1838 to 1867 was judge of the Court of Admiralty. (It may be added that reference to the source indicated in the footnote at this point revealed a total irrelevance to the text; there seems to have been some displacement in the annotation.)

Special care is called for in the reading of Latin in proof, as the printer cannot be expected to be learned in the Latin of the law. More vigilant proof-reading would have avoided such blemishes as *a vincula matrimonii* (p. 121) and *et vinculo matrimonii* (p. 160), *ex mero motir* (p. 152), *Senatus Consultam Velleianum* (p. 201), *peculium profectitum* (p. 205), *animus injurandi* (pp. 224 and 225), *virgo intacto* (p. 225), *actio injuriam* (p. 226), and *capit et asportavit* (p. 293). At one point (on p. 202) the Placaat or Edict of Emperor Charles V relating to marriage settlements is attributed to the year 1841 instead of 1540. In the section on The Magistrates' Court (at the end of Chap. 10) there are several errors of syntax.

The book badly needs a Glossary. We learn, for example (at p. 101), that "The Gansabhawa functioned during the Portuguese period. It was presided over by the Vidane, who would be assisted by the Kannakkapulle, Korale, Arachchi, Liyanna, Mudiya and Mananna." Of the eight esoteric terms in this passage, only the first is to be found in the Index (which—amounting to 4½ pages—is hopelessly inadequate for a book of this size and detail). For the others, the reader must turn back through the previous 100 pages, in the hope of finding any explanation that may have been given on their first appearance.

A map, too, would have been useful. This may seem an unusual requirement in a law book; but this is an unusual law book. It deals with an Island whose geography is as unfamiliar as its history to the majority of readers, and whose legal pattern corresponds to some extent with geographical divisions. It is almost impossible to read the book intelligently without an atlas at hand; and even the roughest sketch-map within its covers would have been a most convenient adjunct.

To sum up, this is a valuable and fascinating book; and it may be hoped that with the rapid evolution of laws and constitution in independent Ceylon

a new edition (in which these minor criticisms may be silenced) will be forthcoming, to keep the student of comparative and constitutional laws abreast of events.

G. Ellenbogen.

The Principles of Public Administration. By Benjamin Akzin, Professor of Political Science at the Hebrew University of Jerusalem. [Tel-Aviv: D'vir Publication House. 268 pp.]

Professor Akzin, who is Dean of the Law Faculty of the Hebrew University of Jerusalem, has published in Hebrew the first introduction in that language for students on public administration. The book is based on a course of lectures which he gave not at the University, but at a School of Adult Education in Israel; and has the advantage of being lucid and simple and suitable for the general reader as well as for the University student. He is concerned to expound the general principles of the subject, and deliberately does not deal with the present system of administration in Israel. He brings to his task a wide knowledge of the literature of the United States and England, France and Germany. The American sources are the most used no doubt, because Professor Akzin, before he came to Jerusalem, was teaching in American Universities. His book is comprehensive, and will be of the greatest value to the young State, and the way in which the subject is rendered in modern Hebrew is impressive. One interesting observation may be quoted. Dealing with the question of party spirit in the civil service, he notes that, contrary to general opinion, it is not the English but the French civil service which is completely divorced from party influences.

Norman Bentwich.

The Young Delinquent in his Social Setting. A Glasgow Study. By T. Ferguson, Professor of Public Health and Social Medicine, University of Glasgow. [London: Published for the Nuffield Foundation by Oxford University Press. 1952. xii and 158 pp. 10s. 6d.]

The generation born shortly before and during the last war has contributed more than any other to the grave increase of crime which has recently taken place in this country despite reduction in poverty and the virtual elimination of long-term unemployment. In the welter of suggestion and counter-suggestion about the reason and possible remedies for such an appalling situation, this statistical inquiry undertaken at Glasgow by a team of sociologists (with the close co-operation of the Chief Constable and the Probation Officer of the area involved) makes its contribution in a quiet, unobtrusive and factual way. Delinquency is studied in three groups of boys against the unhappy background of the big city environment in which they live; one group consisted of the 1,349 boys who left the ordinary schools in January, 1947, at the age of 14; the second of almost 500 boys of about the same age who were educated in special schools for physically handicapped children or registered as "disabled persons"; the third was composed of 301 lads who, at sixteen, left schools for mentally handicapped children. Criminality among these boys, during and after school age up to 18, is considered in relation to a wide range of social and environmental factors: housing, overcrowding in the home, general standard of family assessment by experienced social workers, family disruption or otherwise, nature and regularity of father's employment, physical, educational and temperamental character of the boys, job-preference at the time of school leaving and their success at work or amount of unemployment thereafter.

The assembly of statistical information of this kind cannot produce any great surprises; and in all three groups, as was to be expected, the incidence of crime moves along similar lines. There is no doubt however that these figures brought together by careful field-work and searching of police files provide a valuable check upon current conjectures and opinions and help to place them on a more solid foundation of fact. Sometimes, too, they can upset, or at least question, established preconceived notions. Thus the Glasgow statistics seem to point to the relative unimportance of the contribution of the "broken home" to juvenile delinquency; "the presence of a bad parent in the home" comments the author, "is a much greater menace than his absence from it." Another noteworthy finding among many is the recognition of low scholastic ability, or at least poor performance at school, as the most frequent single factor associated with a high rate of delinquency.

Professor Ferguson not only tabulates his figures, he also interprets them. This interpretation is based on the frequency of negative circumstances in the environment of delinquent boys (poor housing, low intelligence, poor employment record or previous convictions of the father, etc.) and their relation to each other. "Any one of these adverse factors by itself is bad enough," the author comments, "but the main danger springs from a co-existence of adversities which, together, may make it difficult indeed for a lad to keep out of trouble." It is at this stage that the reader, having made his way through the seventy-nine tables and numerous graphs in this volume, may ask himself whether the frequent concurrence and accumulation of these grave hazards does not point to some common deeper cause, not independent of environment and social setting, but itself shaping it. This impression hardens when one finds poor housing, for instance, almost invariably coupled with a high rate of crime but notes at the same time that rehousing of families under the city's slum-clearance schemes has failed to secure any reduction of delinquency even after as long a period as ten years.

In the treatment of offenders after conviction we have learnt in the past few decades that individualism is of paramount importance; statistics, on the other hand, are of necessity concerned with groups. Thus if an attempt is here made, by correlation of statistics and permutation of figures, to establish the factors "operating most strongly in the *causation* of delinquency" among children and young people, it is as well to bear in mind that only by breaking up these groups still further into detailed individual case studies (and this book contains only a few) can an answer be found why *any single one* of these boys went wrong.

Moreover there is a danger of a logical fallacy. As Mr. D. H. Stott and others have pointed out, the fact that certain things are more often observed in the families and surroundings of delinquents than elsewhere does not in the least justify the assumption that these things and conditions are *causes*. When one reads, for instance, in the study under review, that "there appears to be an optimum range of height and weight at which delinquency rates are at their lowest," one cannot avoid the impression that here at least the cart has been put before the horse. There is risk of similar confusion, and Professor Ferguson is of course aware of it, in the discussion of success at work and what is neatly termed "work satisfaction." Boys undergoing apprenticeship or doing skilled work showed appreciably lower conviction rates than those not in receipt of any training of this kind, but whether they were able to obtain and to hold a better job because they had not been and were not so likely to get into trouble, or whether they did not get into trouble because they had better work is certainly a question which no statistics can disentangle.

Such a conundrum does not, of course, absolve Society from the duty of providing opportunities of vocational training for a skilled trade whenever there is any desire and aptitude for it. Slums and overcrowding would be a disgrace, even if by some miracle they were not also the hot-bed of crime; that their relative importance among the adverse environmental factors making

for criminality is high gives added urgency to the housing programme. There are other ideas of a less direct kind which arise incidentally out of this useful Glasgow study of the young delinquent in his social setting. One table, in the chapter on "response to treatment," might be singled out because it is particularly suggestive in more ways than one. Of all the various measures employed in dealing with delinquent boys at Glasgow, fining the parents or binding them over to find caution was by far the most successful in preventing recurrence of delinquency in the relatively few cases where it was employed by the court. It is indeed surprising, after all that has been said in recent years about home influence and parental responsibility, that the powers under the Children and Young Persons Act, 1933, s. 55, should be so rarely invoked.

H. A. Hammelmann.

The Principles of Agency. By H. G. Hanbury, D.C.L. [London: Stevens & Sons, Ltd. 1952. xviii and 237 pp. (including index). 25s. net.]

This volume contains a series of lectures delivered by Professor Hanbury at Oxford. It is emphatically not a textbook, and if one bears this in mind the disappointment which one feels on reading it will be sensibly mitigated. In a course of lectures the lecturer naturally concentrates on an endeavour to bring out general principles, on the removal of his hearers' difficulties, on divergences in judicial opinion, sometimes even on odd corners of his subject-matter which have particularly interested him, and in other ways is inclined to emphases which would mar a textbook. Conversely, one does not expect in such a course the uniform flow of exposition, the meticulous accuracy of expression, the careful if rather exiguous use of illustration, the valiant attempt to state the law in such a way as to cover all the decisions, which are characteristic, sometimes unfortunately so, of the textbook writer. On this basis the present volume will be found well worthy of careful study.

It is evidently intended for students who are already well grounded in the law of contract, and have that amount of knowledge of agency law which is acquired by the study of one of the recognised textbooks in contract. Without this much acquaintance with the subject the student would find it very difficult. Moreover it ought to be read in conjunction with *Bowstead's Digest*, or the chapter on this subject in *Halsbury's Laws of England* so as to provide a background against which Professor Hanbury's less orthodox pronouncements may be pondered; for otherwise they may cause confusion to the unwary.

When I say this, the sort of thing which I have in mind is well illustrated at the very beginning of the book in the statement that "the basic principle is that the agent drops out, and the principal is left in contractual relationship with a third party." To describe this principle as basic seems to put the cart before the horse. Surely the whole object of agency is to enable contractual relationships to be entered into through the representation of a third party? The fact that this third party then drops out is quite subsidiary to this "basic principle." And indeed, as Professor Hanbury points out later on, he does not always "drop out."

It may be said that the point is one of emphasis only. But with students emphasis is of great importance, and in this book it seems to me to be frequently all wrong. Another illustration is the statement at p. 54 that the problems of the entitlement of the agent to commission is in some ways the most important in the law of agency. It does, of course, give rise to the difficulties which Professor Hanbury handles with great skill, but again they are subsidiary to the main principles which are, I submit, concerned with the establishment of contractual relationships.

To take another case, in the first chapter there is the usual distinguishing of the agent from other persons who fulfil somewhat similar roles in the law.

Here it is usual to give pride of place to the interrelationship of servants and agents which has been over-discussed, perhaps, but deserves more than one page towards the end of the chapter, and might include some reference to the literature in the American journals—incidentally while mention is made of most of the articles in the English periodicals the much more important American contributions to the subject appear to be completely ignored. Professor Hanbury, not unexpectedly perhaps, devotes much more space to distinguishing trusteeship from agency. During the course of this discussion he makes the statement that "the relation of principal and agent is that of debtor to creditor." Taken *tout court* this statement seems to me to be altogether misleading. In the famous case of *Foley* v. *Hill* (1848) 2 H.L.Cas. 28, it was argued that the relationship of banker and customer was analogous to that of principal and agent and that therefore the customer was entitled to an account in equity, to which claim, being of a fiduciary nature, the Statute of Limitations would not apply. The House of Lords rejected this contention on the ground that the relationship was not that of principal and agent, but of debtor and creditor. Apart from this it will generally be agreed that principal and agent is a relationship which has many fiduciary aspects.

Actually the first distinction drawn in this chapter is between agency and mandate, but all that we are given about *mandatum* is a short summary of Roman law which does not necessarily help us to understand the distinction in English law. Incidentally, there is not much authority on mandate in our law, though there are a few important cases on the subject, like *London Joint Stock Bank* v. *McMillan* [1918] A.C. 777. Some discussion of this subject would have been of much interest.

The references to *mandatum* in Roman law might profitably have led to a historical introduction to the law of agency which is of much interest for, simple and essential as agency now seems to be, it was a conception arrived at with much difficulty.

In the important chapter on different types of agent there is naturally a discussion of the difference between factors and brokers. One important practical difference which is overlooked is that brokers are often middlemen authorised to act as agents for both parties, thus the broker issues a "'sold' note" to his principal the seller, and a "'bought' note" to his principal the buyer. Another point is that the *del credere* agent whose special type of undertaking gives rise to so many interesting problems has almost disappeared from ordinary commerce.

In his discussion of agency of necessity, a fascinating subject, Professor Hanbury includes among the varieties of this limited species the acceptor for honour of a bill of exchange, thus giving the weight of his authority to a suggestion made by Bowstead in his *Digest*. I do not myself think that this is agency of necessity at all. The acceptor does not purport to act as agent, nor is there in any ordinary sense of the term "necessity" for his action. Moreover, such acceptor does not satisfy the requirement laid down by Scrutton L.J. in *Jebara* v. *Ottoman Bank* [1927] 2 K.B. 254, and quoted with apparent approval by Professor Hanbury, that there can be no agency of necessity unless there is a pre-existing agency out of which it arises. My criticism however is chiefly directed to the fact that the matter is treated as beyond doubt, though as far as I am aware none of the well-known textbooks on contract treats the acceptor for honour as an agent of necessity.

One of the attractive features of the book is the catholicity of illustration from the reported cases, and particularly from the more modern ones. This makes it refreshing to read, though on a number of points there is rather more illustration than is needed and one feels that it would have been better to have saved space for the discussion of matters which are left out. I have already indicated that I think a lecturer is fully justified in handling at some length matters which are perhaps rather peripheral to his subject, and personally I have read with much interest what Professor Hanbury has to say on

the somewhat recondite subject of the marine insurance broker's rights of lien over the policies which he effects. But I could have wished that there had been some treatment of the various important agency points which arise in more familiar branches of commerce such as banking. Apart, however, from a rather oblique reference to section 82 of the Bills of Exchange Act, 1882, in connection with a group of cases in which agents have misused their authority, this subject is pretty well ignored.

There are a number of other topics upon which I would like to comment if space permitted, for there is so much in this book which is stimulating and thought provoking. The literature on agency in this country is so scanty that one hopes that in the next edition Professor Hanbury will substantially enlarge this volume and also that he will get somebody to make him a respectable index, for the present one is about the worst it has ever been my misfortune to try to use.

C.

GORE-BROWN'S HANDBOOK OF JOINT STOCK COMPANIES. Forty-first Edition by PHILIP JAMES SYKES, M.A., Barrister-at-Law, Bencher of Lincoln's Inn, L. J. MORRIS SMITH of Gray's Inn, Barrister-at-Law, OLIVER SMITH, of Lincoln's Inn, Barrister-at-Law, and STANLEY BORRIE, Solicitor. [London : Jordan & Sons, Ltd. 1952. cviii and 996 pp. £3 3s. 0d.]

THIS book, now rapidly approaching its centenary, has always been fortunate in its editors who have ensured that its periodical revisions have been exceptionally thorough. As a result it carries its years better than many of its younger rivals and remains, despite its age, and somewhat antiquated title, the leading narrative manual for practitioners. It is, for example, the only book where the provisions of the Prevention of Fraud (Investments) Act, 1939, are given anything approaching adequate treatment. Its major defect, which it shares with most practitioners' books, is that it is better at collecting detailed rules than at explaining their purpose or at extracting general principles from them; this defect appears especially in the treatment of such matters as a company's liability for fraudulent acts of its directors (pp. 390–392), and the rule in *Royal British Bank* v. *Turquand* (pp. 440 *et seq.*). It is, nevertheless, a mine of accurate and, on the whole, well arranged information and virtually indispensable to company lawyers.

The new edition, the first since the 1948 Act, has involved a complete overhaul of the whole book. The most obvious changes are the deletion of the separate chapters on banking and insurance companies, and an almost completely rewritten chapter on accounts (not, it must be said, wholly successful consisting as it does largely of quotations of sections and Schedules of the Act). The additional work of general revision has again been done most thoroughly and no decisions or legislation of any importance seem to have escaped the editors' vigilance. On the other hand there is still neither reference to nor explanation of the modern practice of forming as a private company and immediately converting into a public one. And certain misleading statements remain uncorrected. For example, *Moseley* v. *Koffyfontein Mines* [1904] 2 Ch. 108, is cited at pp. 235, 283 and 289 for the proposition that debentures issued at a discount can *never* validly be converted into fully paid shares of equivalent nominal values, which is supported neither by the decision nor by prevailing practice. Nor is it by any means clear that a company necessarily loses its lien by passing a transfer (p. 244), and the statement (p. 326) relative to the issuing of substituted debentures every fourteen days to avoid registration, should be coupled with a warning about the possible effect of section 322. And, in an essentially practical work of this nature it seems a pity that the all-important tax questions are completely ignored. About the only reference

to them, a most tantalising one, is the statement at p. 769 that "resort is had, where possible, to a reorganisation of an existing company, particularly having regard to taxation questions which may arise on a reconstruction, a consideration of which is outside the scope of this work."

The type has been completely reset, but unfortunately the publishers have not been persuaded to adopt orthodox methods of case-citation instead of their invariable use of square brackets—producing such strange results as [1866] 1 Ch. 561 and [1880] 5 A.C. 317—and no indication is given, even in the Table of Cases, of the court in which the case was decided. There is no Table of Statutes apart from a synopsis of the Companies Act, 1948, which, unfortunately, does not indicate the place in the text where each section is dealt with. It is also a pity that the learned editors could not have stated the date to which the book has been revised; internal evidence suggests that the text is amended to the end of 1951 and that the Addendum is as at the beginning of the Long Vacation, 1952.

The learned editors and the publishers are, however, to be heartily congratulated upon a good job. The price, by modern standards, is exceptionally reasonable.

L. C. B. G.

Kerr on Receivers. Twelfth Edition by Raymond Walton, M.A., B.C.L., of Lincoln's Inn, Barrister-at-Law and A. Wilfred Sarson, Chartered Accountant. [London : Sweet & Maxwell, Ltd. 1952. lxiv and 486 pp. £2 15s. 0d.]

This is one of the many practitioners' books which reappear at regular intervals for no very obvious reason. A partial explanation is probably that it is purchased by conscientious chartered accountants when they obtain their first receiverships, but it seems doubtful whether they have obtained from it the help that they expected, for it is an indigestible book even to lawyers. In recognition of this fact the publishers have wisely associated a chartered accountant with the preparation of the new edition which is undoubtedly much improved in intelligibility. The work is now divided into two parts, one dealing with receivers appointed by the court and the other with receivers appointed out of court. The single chapter which alone was formerly devoted to the latter has been split into three and, so far as concerns company receivers, largely rewritten. The opportunity has also been taken to improve the lay-out.

Unfortunately the learned editors do not seem to have been sufficiently bold in revising the text, particularly in the earlier part. For example, the treatment of receivers of statutory companies (pp. 52–54) is still marred by a failure to bring out clearly the difference between mortgages under the Companies Clauses Act, 1845, and debenture stock under the 1863 Act; it is unjustified to devote several pages (pp. 61–63) to a treatment of receivers of railway companies merely adding a footnote to the effect that nationalisation has greatly diminished their practical importance; and it is no longer true, as stated at pp. 70 and 125, that where a receiver is appointed after liquidation it is the usual practice of the court to appoint the liquidator. At times, too, the arrangement is faulty: for example, at p. 198 the greater part of the material seems to have nothing to do with *Petition to Wind Up* under which heading it appears.

Still, the book contains a considerable amount of valuable material and the editors are to be congratulated upon a serious attempt to render it more accessible and intelligible. As the book has survived so long there is every reason to suppose that it will continue, particularly since this much needed transfusion of new blood. If, in the next edition, the editors show greater ruthlessness in cutting out dead wood it may become a work of real value.

L. C. B. G.

THE LAW RELATING TO MONEYLENDERS. By SIR GILBERT STONE and LORD MESTON. Fourth Edition by LORD MESTON. [London: The Solicitors' Law Stationery Society, Ltd. 1952. xl and 451 pp. (with index). 70s. net.]

THIS work achieved an immediate success on its first appearance in 1927, and, there having been no new edition since 1936, this edition will be very welcome not only to the legal profession but among moneylenders also.

The legal problems confronting moneylenders and those who borrow from them are dealt with comprehensively and thoroughly. The provisions of the two principal Acts which regulate the business of moneylenders, those of 1900 and 1927, are clearly set out, and explained by reference to the cases decided in relation to their provisions: pretty well every relevant case is digested, and one wonders whether the result may not tend to confuse the non-professional reader. The relevant parts of other statutes which closely concern moneylenders such as the Bills of Sale Acts, the Bills of Exchange Act, 1882, and the Bankruptcy Acts are also competently dealt with. There are substantial chapters on Criminal Liability and on Procedure which is often of special importance in moneylending cases. In the Appendices the various Moneylenders Acts are printed together with a complete list of the cases decided under them, with cross-references to the pages in the book at which they are discussed, a most convenient way of handling the subject. There are also given a number of the more important statutory rules and regulations affecting moneylenders, and a set of interest tables.

During the fifteen years since the third edition appeared there has been a substantial volume of litigation relating to the construction of the 1927 Act, particularly as to the requirements of the written memorandum under s. 6 (2): there have been a number of important decisions in which the courts have pretty well taken the financing of hire-purchase contracts out of the operation of the Moneylenders Acts; and there have naturally been numerous decisions in connection with applications for reopening transactions. This new material has been incorporated by Lord Meston in full detail, perhaps in too full detail.

A valuable feature of the book is its clarity, both in arrangement and language, and this cannot fail to commend it to those laymen who have a sufficient knowledge of legal terms to justify their embarking upon the perusal of a substantial textbook.

C.

THE LAW OF INCOME TAX. By E. M. KONSTAM, Q.C. Twelfth Edition [London: Stevens & Sons, Ltd. and Sweet & Maxwell, Ltd. 1952. lxxvii and 500 pp. approx. (with index 82 pp.) £4 10s. net.]

THE eleventh edition of this classic work appeared as recently as 1950 and was fully reviewed at 14 M.L.R. 244–45; this edition was in two parts, the first a narrative commentary on the statute and case law and the second containing the Acts, Statutory Regulations, Orders, etc. The current edition, which has been necessitated by the new consolidation Act—the Income Tax Act. 1952—reproduces in unaltered form and lay-out the first part of the 1950 edition, the second part being made available in similar form by the same publishers' *CLITAS* to which Konstam is keyed. The only change made in the 1952 edition, besides the necessary alterations in footnote references to the statutes and the interweaving of post-1950 case law into the narrative, is the addition of a new chapter (No. 21) entitled "Prohibitions and Offences" devoted to section 468 of the Income Tax Act, 1952 (unlawful transfer of residence

abroad). This excellent work is as indispensable as ever to the lawyer and all engaged in revenue law.

The work will be kept up to date by cumulative supplements, the third of which, embracing the Finance Act, 1953, has just appeared.

A. Farnsworth.

Rating Valuation Practice. By Phillip R. Bean and Arthur Lockwood. Third Edition. [London : Stevens & Sons, Ltd. 1952. 355 pp. 35s. net.]

The second edition of this work was reviewed at 14 M.L.R. 380 and the only material alteration in the current one is the deletion of the chapter relating to the Rating and Valuation Act, 1935. Four valuable appendices are added, in which are set out the relevant provisions of the Local Government Act, 1948, the Statutory Instruments, Lands Tribunals Rules, 1949, and the official forms for Amendment of the Valuation List. The issue of another edition within two years bespeaks its value both to practitioners and to the students to whom it is highly commended. A. F.

Fourth Copyright Law Symposium. Nathan Burkan Memorial Competition. [American Society of Composers, Authors, and Publishers, New York. 1952. xvii and 179 pp.]

"The Nathan Burkan Memorial Competition is designed to encourage law students to give original thought to a branch of law in whose continued growth lies the assurance that our authors and composers will be able to exist and create with security and freedom," writes the General Attorney of the American Society of Composers, Authors and Publishers in the introduction to this symposium of four papers by undergraduates of American law schools on the subject of copyright. The first paper, by Melville B. Nimmer of Harvard University Law School on "Inroads on Copyright Protection," is of particular interest to British readers at a moment when the report of the Copyright Committee has been presented to Parliament and a revision of our own copyright law is imminent. The problems discussed by Mr. Nimmer concern the British legislator and copyright lawyer as much as his American counterpart. They comprise the general question of finding the equitable balance between the aim of protecting the work of one author and the necessity at the same time to leave other creative writers reasonably free from the fear of law suits. This point leads Mr. Nimmer to the further question what is a "substantial" or "material" part of a work which must have been copied to give rise to an infringement action. Mr. Nimmer shows how the American courts have made the test of "substantial copying" so stringent that too much leeway is given to the defendant's right, a reproach which cannot be levied against British courts in copyright cases.

The second paper, by Clinton R. Ashford of the University of Michigan Law School, deals with the "Compulsory Manufacturing Provision in the U.S. Copyright Act" and demands its complete abolition. Mr. Ashford shows that this provision is contrary to the interests of the American public and the majority of American authors and proves that it is anachronistic as well as grossly unfair to foreign authors. He warns vested interests in the U.S.A. of the danger of retaliation by other countries, a warning highly justified in the light of the remarks of the British Copyright Committee, paragraphs 5 and 6.

The third paper on the "Doctrine of Moral Right and American Copyright Law," by Arthur S. Katz of New York University Law School, proposes to make the doctrine of moral right an integral part of American law. Mr. Katz

draws widely on the laws and jurisprudence of England, Germany, Austria, France and Latin America. He makes out a strong case to base the protection of authors not so much on the principle of private property rights as on the moral idea of an inviolate personality.

The last paper, by Charles O. Whitley of Wake Forest School of Law, deals with "Copyrights and the Income Tax Problem." The author shows how the U.S. laws and their interpretation by the courts impose unjust burdens on the author; this is a phenomenon all too familiar to authors and their legal advisors in this country. The treatment of foreign authors under American tax legislation appears particularly unjust, although it seems possible to escape some of its rigours by arranging for an action to be tried in one Federal district court rather than in another.

It is interesting for the English reviewer to see to what extent the basic principles of copyright law enunciated by Lord Mansfield and other great English judges of the eighteenth century influence U.S. copyright law to the present day.

All four papers show a very high standard of scholarly investigation, of clear exposition of the legal problems and forceful pleading for the reforms aimed at, which is all the more remarkable since the authors when they wrote the papers were still undergraduates at universities.

It can only be regretted that a similar competition is not available to law students in this country.

Peter Meinhardt.

Yearbook on Human Rights for 1950. Compiled by the Human Rights Division of the United Nations Secretariat. [New York: United Nations; London: H.M.S.O. 1952. xvi and 596 pp. 47s. 6d.]

This is the fifth *Yearbook on Human Rights* to be published by the Human Rights Division of the United Nations Secretariat. Generally speaking the volume is compiled in the same way as its predecessors, with sections devoted to national legislation, international treaties and agreements, activities of the United Nations and its agencies in so far as they affect human rights, and laws concerning human rights in trust and non-self-governing territories. There is also one major development which is to be welcomed, the more so by the present viewer who, in his reviews of the two previous volumes (14 M.L.R. 243; 15 M.L.R. 269), deplored the absence of any reference to judicial decisions. Merely by reproducing the texts of national legislative measures a false impression of the realities of the situation is given, for the meaning and practical effect of this legislation normally appear only after the courts have been called upon to apply the measures in question. The 1950 *Yearbook* includes a note of relevant judicial decisions at the end of the entry on municipal legislation of the country concerned. In addition, the section on the United Nations is followed by a note on the activities of the International Court of Justice in the field of human rights.

Since the coming into force of the United Nations Charter there has been much controversy as to the extent to which the United Nations is competent, in view of Article 2 (7) of the Charter, to deal with human rights at all. It is therefore the more interesting to read what the Human Rights Division considers to have been said on the matter by the World Court. Two advisory opinions and one judgment are mentioned. The first opinion relates to the *Interpretation of Peace Treaties* with Bulgaria, Hungary and Rumania. It is true that the dispute between the Western Powers and these former satellites of Germany related to the human rights clauses of the Peace Treaties, but the question submitted to the Court only asked for an interpretation of the interpretation article of the Treaties, and the Court itself pointed out that it was

in no way concerned with the merits of the dispute as to the respect that was or was not accorded to human rights in the three countries in question. In view of this fact, the opinion might well have been omitted from the *Yearbook*. The advisory opinion on South Africa's obligations with regard to South-West Africa is more justifiably included, as is the judgment in the *Asylum Case*.

In his review of the 1948 *Yearbook*, the reviewer said it would be interesting to note what appeared in the 1950 volume with regard to the promotion of human rights in the Union of South Africa (14 M.L.R. 244). The legislative measures reproduced are the Group Areas Act—though how anyone can regard as promoting respect for human rights an article which describes as "coloured" "any woman, to whichever race, tribe or class she may belong, between whom and a person who is . . . a member of the coloured group, there exists a marriage, or who cohabits with such a person," is somewhat difficult to appreciate—and the Suppression of Communism Act, the reading of which makes it clear that "Communism" in South Africa has a meaning that is only comprehensible to the Minister of Justice. The only redeeming feature of the entry is the decision of the Appellate Division of the Supreme Court in *R.* v. *Abduraman* ([1950] 3 S.A.L.R.(A.D.) 136). In this case the court held invalid as unreasonable railway regulations concerning separate railway coaches for the separate races. Unfortunately, the *Yearbook* makes no mention of the fact that while the case was *sub judice* the Railway Act, 1916, under which the regulations had been issued, was amended and brought into line with the general separatist legislation of the Union (see the reviewer's "The Legality of 'Jim Crow' Regulations," 3 I.L.Q. [1950], p. 590, at p. 592).

There is much of interest to be found in every part of the *Yearbook*, but it is high time that the Secretariat ceased relying for its information solely on the material provided by governments. So long as this is the case, so long will the *Yearbook* present one-sided pictures of the situation concerning human rights at the present day. There are certain matters which are published in government information bulletins and in reputable organs of the Press which must be within the knowledge of the Human Rights Division. If the *Yearbook* is to serve any valuable purpose in the promotion of human rights its compilers must not be afraid of including material of which governments might justly be ashamed.

L. C. Green.

The Law of Nations: Cases, Documents and Notes. By Herbert W. Briggs. Second Edition. [London: Stevens & Sons, Ltd. 1952. xxvii and 1108 pp. £3 3s. net.]

The student of international law who is able and willing to spend not quite £3 on a casebook, will certainly buy his money's worth if he invests in this book. It does not, it is true, cover the whole field; thus international organisations, international litigation and war are some of the matters which one would have liked dealt with more adequately and the neglect of which cannot be excused by the statement that they merely raise problems of a "special nature" (p. vi). But as a companion to a textbook or a lecture this work is probably the best of its kind that has yet appeared. For it contains not only the reports of something like 200 decisions, among them many rendered by municipal courts outside the United States of America, but also a considerable amount of other material in the form of Documents and Editor's Notes.

As regards the former, to draw attention only to a few selected at random, one notices the text of the Briand-Kellogg Pact and of The Hague Regulations of 1907; two Notes presented by the United States on the right to close ports occupied by insurgents; the main Articles (with commentary) of the Harvard Research Draft Convention on Diplomatic Immunities (1932); the observations submitted by the United Kingdom in 1948 on the duty to recognise new States; the statutory provisions of the United States, the United Kingdom and France

relating to the loss of nationality; an exchange of Notes on the agrarian expropriation in Mexico. All this material is supplemented by about 100 Notes in which Professor Briggs introduces, summarises or explains each of his subjects and in which he makes reference to other material to which a keen student may profitably turn.

No casebook is able or intended to be a substitute for a library, a textbook or a lecture. But this casebook comes as near that aim as may be possible. Even many practitioners are likely to derive help from this book and from the guidance "through a vast bibliographical jungle," which it gives.

F. A. Mann.

The Grotius Society : Transactions for the Year 1951. Vol. 37. [London: The Grotius Society. 1952. xxiii and 184 pp. Price to non-members 25s.]

This volume contains eight papers read to the Society in 1951. The papers, which are not of equal merit and interest, cover a number of topics and, as usual, the majority are devoted to public international law.

Dr. Georges Kaeckenbeeck opens with a valuable survey of the International Authority for the Ruhr and the European Coal and Steel Community. The IAR, based on a co-ordination of sovereignties, belonged to the classical type of international organisation. The ECSC represents a new and daring venture; one recalls that the President of the High Authority, M. Jean Monnet (one of the principal architects of the Schuman Plan), at its inaugural meeting on August 10, 1952, emphatically stressed that the Authority was a truly supra-national body, not responsible to the Parliaments of the various member States of the Community. Mr. C. Wilfred Jenks' paper on "The Impact of International Organisations on Public and Private International Law" is as thought-provoking as his optimistic appraisal of the scope and effectiveness of international law of today is surprising. Mr. G. Tracey Watts gives an instructive and amusing account of the practical difficulties encountered by the British Military Administration of Cyrenaica during the years 1942–1949. With the sole help of the *Manual of Military Law* and a copy of the second volume of Oppenheim's *International Law* the Chief Legal Adviser and his staff had to meet the multifarious problems involved in the establishing of a new Administration and a judicial system. Mr. E. T. Iwi sketches "The Evolution of the Commonwealth since the Statute of Westminster" and, somewhat hopefully, advocates the creation of a Commonwealth Privy Council with its own judicial committee.

Professor T. B. Smith breaks fresh ground in his paper on "Mental Abnormality and Responsibility in International Criminal Law." He believes in the existence of an international criminal law involving the responsibility of individuals and remains unconvinced that "when individuals are tried for war crimes, such trials are merely an extension under international law of the municipal law of particular States." Even if his examination of some of the Tokyo and Nuremberg trials fails in its turn to convert the reader, the latter cannot but benefit from the many illuminating comments on comparative criminal law and procedure. "The present Position of the Red Cross Geneva Conventions" is examined by Dr. Agenor Krafft. The extension of the 1949 Geneva Conventions to civilians is a striking development. Their authors may on occasion have been guilty of facile optimism (which perhaps explains why ratifications are coming in so slowly) yet the Conventions stand out as an honest endeavour to diminish as far as possible the horrors of any future war. Conflict of laws is worthily represented by Professor Graveson's stimulating paper on "The Recognition of Foreign Divorce Decrees." He offers some constructive suggestions to end the anomaly created by the fact that, while the rules of recognition of foreign divorce decrees have remained static, the

rules governing jurisdiction in divorce of English courts have been developed to mitigate the hardship suffered by a deserted wife. The volume concludes with Professor Hanbury's thoughtful study of "The Territorial Limits of Criminal Jurisdiction" in which he surveys some recent developments in this field.

J. K. Grodecki.

Bicentenaire de l'Esprit des Lois (1748–1948). Montesquieu : sa pensée politique et constitutionelle. Sous la direction de Boris Mirkine-Guetzevitch et Henri Puget. [Paris: Recueil Sirey. 1952. 328 pp.]

The bicentenary of the publication of *De l'esprit des Lois* was celebrated in Paris by a series of lectures which are now gathered in this book. There is hardly any of the classics of political thinking which needs more to be called to mind in these days than the work which above all others implanted in the Western mind the belief in the rule of law. The great lessons that Montesquieu taught were that justice is only secure when it is separated from politics, and liberty when power is freed from the temptations of absolutism by being divided. It would have been pleasant to say that this symposium is worthy of its subject, but the truth is that it must be regarded mainly as a work of piety. All but two of the fifteen contributors are jurists, but unfortunately their subjects belong to the fields of history and political theory rather than jurisprudence and their lectures are rather slight and superficial. An interesting discussion by M. Charles Eisenmann of the constitutional thought of Montesquieu, which refutes very well some of the common misinterpretations, should be exempted from this judgment. However, along with a good deal of repetition, the lectures have all the flowers of French academic and forensic eloquence, and were doubtless pleasing to hear.

A. Cobban.

Entscheidungen des Bundesverfassungsgerichts. Herausgegeben von den Mitgliedern des Bundesverfassungsgerichts. Vol. 1. [J. C. B. Mohr (Paul Siebeck) Tübingen. 1952. viii and 454 pp. DM. 26.]

The German Constitutional Court has in consequence of the controversy on the ratification of the Bonn Treaty and its supplementary agreements become one of the world's most widely publicised courts. Its vital importance for the structure and the political life of the Western German Federal Republic does not, however, depend upon this one particular instance, however significant it may appear. The Basic Law of the Federal Republic has assigned to the Federal Constitutional Court a number of tasks which in their totality render that court a veritable "guardian of the constitution." Outside observers may perhaps be inclined to think that the Basic Law—in a revulsion against the state of lawlessness persisting in constitutional matters during the period of the Nazi régime, which is easily comprehensible—has somewhat overstressed the aspect of legality in political life. Undoubtedly the court has during the first year of its existence been compelled to deal with a number of points of little or no practical importance. This is not surprising, if one remembers that the Basic Law permits any member of the public to bring an action before the Constitutional Court for violation of every citizen's fundamental rights which are listed in the Basic Law. These rules of the Basic Law leave in some instances far too much scope for the ingenuities or disingenuities of interpretation. But it is obvious from a perusal that the court has got through

this first wave of less meritorious petitions with highly commendable speed and energy and is settling down to the more important tasks allotted to it.

It is not without significance that the court publishes its own series of reports. Its predecessor during the period of the Weimar Republic had to be content with a modest appendix to the series of reports of the Reichsgericht. The change is not merely characteristic of the increase in the importance of the Constitutional Court as compared to that of the old Court of State Law. It is the inevitable consequence of the fact that the new court includes a considerable number of judges who are not Members of the Federal Court, which in most other respects has become the heir to the traditions of the Reichsgericht. The new court is neither in law nor in fact a mere section of the Federal Court, but an independent judicial body which includes a number of eminent lawyers whose reputation rests not upon their achievements on the bench, but upon their experiences as practising advocates, professors of law and in some cases frankly as leading members of one or the other of the larger political parties. It is well known that this latter fact has given rise to some considerable dispute in Germany, but the first volume of the court's decisions shows no influence whatever of political—as opposed to legal—considerations. Where as in Germany the balance of political life is such that a Constitutional Court is required to preserve the balance, it will have to be admitted that a court of that character cannot well function unless it includes on its bench a few personalities who know political life better than merely from hearsay. This is all the more true under present conditions, having regard to the fact that under a dictatorship, such as existed in Germany from 1933 to 1945, constitutional law was simply not in operation with the inevitable consequence that experience in the actual working of a democracy is not too widely spread among practising lawyers. Last not least, the experience made with the professional judges of the Weimar Court of State Law was anything but happy. The judgment of that court on Papen's *coup d'état* signed the death warrant of the Weimar Republic. It can be readily appreciated that in remembering that experience those who were responsible for drafting the Basic Law felt that *vestigia terrent*.

There are few decisions of any court of law which can aspire to making history. In that respect the German Constitutional Court is in a privileged position. Being confined to deciding upon constitutional conflicts it is clearly to a very large extent responsible for the shape of things to come in the German Federal Republic and in consequence in Central Europe in general. This first volume contains the decision on two statutes following which the three South German Länder Baden, Württemberg and Hohenzollern which have existed well-nigh from time immemorial have given way to the new "South Western State." The second volume is to contain, it is understood, the judgment on the legality of the neo-Nazi "Social Reich Party." It may also contain the final judgment on the Bonn Treaty conflict. It will be clear that this series of reports is indispensable not only to anybody interested in German law as such, but to any student of contemporary German and Central European history.

This does not mean that it is of no interest to practitioners in the field of international legal relations. The present volume contains, *e.g.*, a decision from which it appears that Sudeten-Germans may in certain circumstances retain German nationality granted to them in 1939, but may also divest themselves of it. Both, the retention and the divesting, may be effected impliedly—a ruling which may lead to numerous doubts and difficulties, whenever in a more distant future the question of the nationality of such a person may arise.

One must hope that the publishers may find it possible to reduce the price of the series at the earliest possible moment. This is at present out of proportion to that of other comparable series of reports and may prevent the wide circulation of these reports which is clearly desirable.

E. J. Cohn.

Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts in den Jahren 1945–1949. By A. N. Makarov. [Berlin: Walter de Gruyter & Co., and Tübingen: J. C. B. Mohr (Paul Siebeck). 1952. xi and 231 pp.]

Between 1926 and 1934 the Institute for Foreign and International Private Law, then in Berlin under Rabel's directorship, published an annual collection of German decisions relating to private international law. This practice, interrupted during the Nazi régime, is being resumed by the Institute, now at Tübingen, and the first volume covering the years 1945 to 1949 has become available. It has been painstakingly prepared by Professor Makarov who, it is to be hoped, will soon publish the volumes for the subsequent years and thus provide what undoubtedly is a most useful guide to the German conflict of laws. It should be pointed out, however, that in many respects the present volume reflects the state of confusion which prevailed in Germany during the years in question. That conflicts arose almost exclusively in the field of family relations, was, in the circumstances, an inevitable consequence. It is more important to emphasize that there did not exist a Supreme Court which could exercise a unifying influence. Indeed, many decisions reported in this volume, particularly those rendered by county and district courts, cannot in any sense be regarded as authoritative or sometimes even as representative; that in an important international case the Supreme Court of Aden recently relied on a decision of the County Court at Waiblingen, reported in the present volume at p. 3, showed a remarkable lack of the sense of proportion required of lawyers who use comparative material.

F. A. Mann

Der Abbau der Kontrollratsgesetzgebung. By Günther Jaenicke. [Köln-Berlin: Carl Heymanns Verlag. 1952. 55 pp. No price stated.]

This short monograph deals with a narrow point arising from the fact that the legislative functions in Germany as a whole, which eight years ago were entrusted by the Allies to the Control Council, have come to an end. They ceased when after March, 1948, Soviet obstruction made meetings of the Control Council impracticable and have since been superseded by a variety of political and constitutional events in both parts of Germany. The question remains how Control Council legislation, originally enacted by the four Allies, can now be amended or repealed. The author propounds the view that at first the Commander-in-Chief in respect of his Zone and later the Allied High Commission had the power of repeal and that upon the entry into force of the treaties of May, 1952, it will be exercisable by the German Federal Republic. This conclusion accords with practical requirements and with the rapidly changing picture of constitutional developments in Western Germany. The specialist will derive benefit from Dr. Jaenicke's argumentation.

F. A. Mann.

Questions on Banking Practice. Ninth Edition. Revised and issued under the authority of the Council of the Institute of Bankers. [London: Blades, East and Blades, Ltd. 1952. 358 pp. and (index) 89 pp. To members of the Institute of Bankers 12s. 6d. net; to non-members £1 1s. post free.]

The first eight editions of this standard reference book appeared between 1885 and 1930, and the publication of the ninth edition has been held up as a result of the recent war. For those who are not already familiar with the work, it

may be helpful to state briefly its scope and purpose. The present edition comprises 949 questions on matters of banking practice to which answers are provided. These answers are authoritative in the sense that they have been prepared with the collaboration of all the Clearing Banks. Some of the questions are very short; for example, Question 461 asks "Can a banker legally refuse to honour a cheque or bill dated or accepted on a Sunday?" Others are lengthy and complicated and, in some cases, the opinion of counsel has been obtained.

Those responsible for the revision of the book have done their work thoroughly, and very few errors or omissions have been noted. Some of the questions in the 1930 edition have been combined, and fresh material has been added. There is perhaps some scope for further improvement in the general arrangement of the subject-matter. The work is divided into five main topics, namely "The Customer," "The Customer's Account," "Negotiable Instruments," "Security for Advances," and "Miscellaneous." Each of these contains numerous sub-divisions, and it would be helpful if, in the next edition, the sub-divisions could be arranged alphabetically.

There are a few small points which might be given attention in the next edition. Thus the answer to Question 567 which asks: "Can an instrument drawn payable to an impersonal payee, such as 'cash,' 'wages,' or 'expenses,' or order, be treated as payable to bearer, and be paid without endorsement?" should include some reference to *Cole* v. *Milsome* [1951] 1 All E.R. 311. The answer to Question 81 contains an out-of-date reference to the Companies Act, 1929 and, in any event, the section cited seems to have no relevance to the answer. In the answer to Question 83 it is stated that under the Companies Act, 1948, notice of a resolution for voluntary winding up has to be advertised in the *London Gazette* within seven days; in fact the 1948 Act extended the period to 14 days.

The work is admirably indexed, though the present reviewer would welcome the addition of tables of cases and of statutes: over 400 cases are cited. [Since this was written, a table of cases has been stencilled on foolscap sheets and is supplied with each copy of the book.] The book is made available to members of the Institute of Bankers at the remarkably low price of 12s. 6d. net.

J. Milnes Holden.

Proving a Will. By E. A. Phillips. Oyez Practice Notes, No. 9. Second Edition by D. R. Le B. Holloway. [Solicitors' Law Stationery Society. 1952. 110 pp. (and tables). 9s. 6d.]

A true story is told about a Town Clerk of many years' standing, who wrote to his London agent to say that his mother had just died, enclosing her will and asking what he should do about it. Nowadays, Phillips' *Proving a Will* would have been the best response.

This "practice note" incorporates in 110 pages a quite remarkable amount of information essential to the articled clerk and the young solicitor faced with the problems of non-contentious probate business. Considering the complexity of probate practice it is a tribute indeed to the author and the editor that they make the way so clear for the tyro; and all the common pitfalls are pointed out. The meticulous detail displayed may be realised from the fact that, dealing with proof of death, room is found for the special rules applicable, *e.g.*, to deaths in Czechoslovakia and in the *Affray* disaster.

Throughout the book there are references to the author's larger work on *Probate and Estate Duty Practice* for those who, despite the compendious character of this book, require further information or precedents of the less common forms used.

Would it perhaps be captious to suggest that *Proving a Will* (despite the title) might be expanded very slightly in the next edition to include the practice

relating to grants of administration on intestacy? It would certainly greatly enhance this book's value to a practitioner.

HAMISH R. GRAY.

THE COMMERCIAL DICTIONARY. By A. G. P. PULLAN, of the Middle Temple, Barrister-at-Law and D. W. ALCOCK, A.S.A.A., A.A.C.C.A. [London: Sweet & Maxwell, Ltd. 1953. v and 316 pp. 25s.]

THIS book is adapted from the *Australian Commercial Dictionary* by Mr. Keith Yorston, but it has been substantially rewritten for use in Great Britain. There is undoubtedly room for a handy guide to the meaning of commercial expressions and this book should do something to make the jargon of lawyers, accountants and economists more readily intelligible to those of us who are unversed in disciplines other than our own. The expressions and abbreviations chosen appear to have been well-selected and, on the whole, the definitions are accurate and clear. Purists, however, will find much to quarrel with; for example, in the definition of "f.o.b.," in the equating of capital watering and bonus issues, and in the statement at p. 68 which implies that all the provisions of the Companies Act, 1948, apply to chartered companies. The definition of "crossed cheque" would also be more helpful if the effect of "not negotiable" crossings was explained. However, in a work of this nature it is inevitable that strict accuracy should often have to be sacrificed to brevity and in general the authors have accomplished their difficult task most commendably.

L. C. B. G.

Books and Publications Received :—

NATHAN'S EQUITY THROUGH THE CASES. Second Edition. By O. R. MARSHALL. [London: Stevens & Sons, Ltd. 1953. Supplement 5s. net. (With main work, 37s. 6d.).]

COSTS IN THE CHANCERY AND QUEEN'S BENCH DIVISIONS. By J. L. R. ROBINSON. Oyez Practice Notes, No. 34. [The Solicitors' Law Stationery Society, Ltd. 1953. 80 pp. 10s. 6d. net.]

MOTOR CLAIMS CASES. Second Cumulative Supplement to Second Edition. By LEONARD BINGHAM. [Butterworth & Co. (Publishers), Ltd. 1953. Price: Main Work and Supplement 50s. net. Supplement alone 15s. net. By post 6d. extra.]

WILLIAMS ON TITLE. Supplement. The law is stated as at May 21, 1953. [Butterworth & Co. (Publishers), Ltd. Price: Main Work and Supplement 77s. 6d. net. Supplement alone 12s. 6d. net. By post 8d. extra.]

EMMET'S NOTES ON PERUSING TITLES AND ON PRACTICAL CONVEYANCING. Thirteenth Edition. Third (Cumulative) Supplement to June 30, 1953. By J. GILCHRIST SMITH, LL.M. [The Solicitors' Law Stationery Society, Ltd. xxiii and 173 pp. 15s. net. Book and Supplement £7 net.]

CLARKE HALL AND MORRISON'S LAW RELATING TO CHILDREN AND YOUNG PERSONS. Supplement to Fourth Edition. By A. C. L. MORRISON, C.B.E. and L. G. BANWELL. [Butterworth & Co. (Publishers), Ltd. 1953. Price: Main Work and Supplement 84s. net. Supplement alone 15s. net. By post 4d. extra.]

Selective Bibliographies of the Library of Peace Palace. I: Fundamentals of Public International Law. Compiled by Dr. B. Landheer and Dr. J. L. F. van Essen. [A. W. Sijthoff's Publishing Co., Leyden. 1953. 85 pp.]

The Supreme Court and Civil Liberties. By Osmond K. Fraenkel. [American Civil Liberties Union, New York. 1952. 90 pp.]

Factory Act Legislation and Employers' Liability. By A. R. Provart, a.c.i.i. Reprinted from Vol. 50 (1953) of the Journal of the Chartered Insurance Institute. [Chartered Insurance Institute. 2s. net.]

Underhill's Law Relating to Trusts and Trustees. Tenth Edition. Third Cumulative Supplement. By M. M. Wells. [Butterworth & Co. (Publishers), Ltd. 1953. Price: Main Work and Supplement, 77s. 6d. Supplement alone: 5s. net. By post 4d. extra.]

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